

11-4-2013

Sales v. Peabody Clerk's Record Dckt. 41446

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IN THE SUPREME COURT OF THE STATE OF IDAHO

TRACY SALES, individually,

Plaintiff-Appellant,

vs.

STACIE PEABODY, individually and doing
business under the assumed name of
FINGERPRINTS DAY SPA,

Defendant-Respondent,

and

LINDA COOK, individually,

Defendant.

Supreme Court Case No. 41446

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the Fourth Judicial District, in and for the County of Ada.

HONORABLE MELISSA MOODY

JAMES F. JACOBSON

ATTORNEY FOR APPELLANT

MERIDIAN, IDAHO

TRACY L. WRIGHT

ATTORNEY FOR RESPONDENT

BOISE, IDAHO

Tracy Sales vs. Stacie Peabody, Linda Cook

Date	Code	User	Judge
4/10/2012	NCPI	TCORTEJN	New Case Filed - Personal Injury
	COMP	TCORTEJN	Complaint Filed
	SMFI	TCORTEJN	Summons Filed
7/12/2012	CHGA	DCELLISJ	Judge Change: Administrative
		DCELLISJ	Notice of Reassignment
10/1/2012	AFOS	CCNELSRF	Affidavit Of Service 09/22/12
	AFOS	CCNELSRF	(2) Affidavit Of Service 09/25/12
10/3/2012	NOAP	CCHOLMEE	Notice Of Appearance (Knotts for Stacie Peabody)
10/11/2012	ANSW	CCMEYEAR	Answer of Defendant Linda Cook to Plaintiff's Complaint
10/24/2012	NOTC	DCABBOSM	Notice of Status Conference
	HRSC	DCABBOSM	Hearing Scheduled (Status 11/19/2012 03:00 PM)
11/2/2012	ANSW	CCKHAMSA	Answer And Demand Of Jury Trial (Carey Perkins LLC For Defendants Stacie Peaboy dba fingerprints Day Spa)
11/7/2012	NOTS	MCBIEHKJ	Notice Of Service
11/19/2012	DCHH	TCHOCA	Hearing result for Status scheduled on 11/19/2012 03:00 PM: District Court Hearing Held Court Reporter: Mia Martorelli Trnsript Pages for this hearing estimated: 50
	HRSC	TCHOCA	Hearing Scheduled (Civil Pretrial Conference 08/05/2013 03:00 PM)
	HRSC	TCHOCA	Hearing Scheduled (Jury Trial 08/26/2013 08:30 AM) 4 Days
11/29/2012	ORDR	DCABBOSM	Scheduling Order
	NODT	CCSWEECE	Notice Of Taking Deposition Duces Tecum of Tracy Sales
12/10/2012	NOTC	CCTHIEKJ	Notice of Association (Ryan for Linda Cook)
12/21/2012	NOTS	CCHEATJL	Notice Of Service Of Discovery Documents
	NOTS	CCPINKCN	Notice Of Service of Discovery Documents
	NOTC	CCPINKCN	Notice of Taking Deposition Duces Tecum of Tracy Sales
1/23/2013	NOTS	MCBIEHKJ	Notice Of Service
2/26/2013	NOTS	MCBIEHKJ	Notice Of Service
3/19/2013	NOTD	MCBIEHKJ	Notice Of Taking Deposition
3/27/2013	NOTS	CCMEYEAR	Notice Of Service
4/25/2013	MOTN	CCMARTJD	Motion for Summary Judgment
	AFFD	CCMARTJD	Affidavit of Stacie Peabody
	AFFD	CCMARTJD	Affidavit of Linda Cook

Tracy Sales vs. Stacie Peabody, Linda Cook

Date	Code	User	Judge
4/25/2013	MEMO	CCMARTJD	Memorandum in Support of Motion for Summary Judgment
	NOHG	CCMARTJD	Notice Of Hearing re Motion for Summary Judgment (5.28.13@4pm)
	HRSC	CCMARTJD	Hearing Scheduled (Motion for Summary Judgment 05/28/2013 04:00 PM)
5/2/2013	HRVC	TCHOCA	Hearing result for Motion for Summary Judgment scheduled on 05/28/2013 04:00 PM: Hearing Vacated
5/3/2013	AMEN	CCMARTJD	Amended Notice of Hearing re Motion for Summary Judgment (5.23.13@2:30pm)
	HRSC	CCMARTJD	Hearing Scheduled (Motion for Summary Judgment 05/23/2013 02:30 PM)
5/8/2013	STIP	CCOSBODK	Stipulation To Amend Scheduling Order
	NOHG	CCOSBODK	Second Amended Notice Of Hearing Re Motion For Summary Judgment (5.28.13 @ 4pm)
	HRSC	CCOSBODK	Hearing Scheduled (Motion for Summary Judgment 05/28/2013 04:00 PM)
5/10/2013	MISC	CCOSBODK	Plaintiffs Expert Witness Disclosure
5/13/2013	HRVC	TCHOCA	Hearing result for Motion for Summary Judgment scheduled on 05/23/2013 02:30 PM: Hearing Vacated
5/14/2013	MEMO	CCSWEECE	Plaintiffs Memorandum in Opposition to Defendants Motion for Summary Judgment
	AFFD	CCSWEECE	Affidavit of James F Jacobson In Opposition to Defendants Motion for Summary Judgment
	AFFD	CCSWEECE	Affidavit of Linda Cook
5/21/2013	MISC	CCGDULKA	Defendants Stacie Peabody and Fingerprint Day Spa's Disclosure of Lay Witnesses
5/23/2013	AFFD	CCPINKCN	Affidavit of Jeffrey L Chandler DPM
5/28/2013	DCHH	TCHOCA	Hearing result for Motion for Summary Judgment scheduled on 05/28/2013 04:00 PM: District Court Hearing Held Court Reporter: Tiffany Fischer Number of Transcript Pages for this hearing estimated: 50
5/29/2013	MISC	MCBIEHKJ	Plaintiffs Disclosure of Lay Witnesses
5/30/2013	ORDR	DCABBOSM	Order Granting Defendants' Motion for Summary Judgment on Count II of the Complaint
6/4/2013	AFFD	CCPINKCN	Affidavit of Doug Schoon
6/11/2013	MOSJ	CCBOYIDR	Defendants Stacie Peabody and Fingerprints Day Spa's Motion to Strike the Disclosure of Doug Schoon and for Summary Judgment RE: Count 1-Negligence

Date: 10/1/2013

Fourth Judicial District Court - Ada County

User: TCWEGEKE

Time: 01:30 PM

ROA Report

Page 3 of 4

Case: CV-PI-2012-06516 Current Judge: Melissa Moody

Tracy Sales vs. Stacie Peabody, etal.

Tracy Sales vs. Stacie Peabody, Linda Cook

Date	Code	User	Judge
6/11/2013	MEMO	CCBOYIDR	Memorandum in Support of Defendants Stacie Peabody and Fingerprints Day Spa's Motion to Strike the Disclosure of Doug Schoon, and for Summary Judgment Re: Count 1- Negligence
	AFFD	CCBOYIDR	Affidavit of Tracy L Wright
6/12/2013	STIP	CCREIDMA	Stipulation To Dismiss Defendant Linda Cook
	NOHG	CCOSBODK	Notice Of Hearing Re Motion To Strike The Disclosure Of Doug Schoon (7.15.13 @ 10am)
	HRSC	CCOSBODK	Hearing Scheduled (Motion 07/15/2013 10:00 AM) Motion To Strike
6/20/2013	WITN	CCMEYEAR	Defendant Stacie Peabody and Fingerprints Day Spa's First Supplemental Expert Witness Disclosure
6/25/2013	MISC	CCNELSRF	Plf's Rebuttal Expert and Lay Witness Disclosures
6/27/2013	NOTD	TCLAFFSD	Notice Of Deposition Duces Tecum Of Linda Cook
7/2/2013	MOTN	CCPINKCN	Plaintiff's Motion to Strike
	AFFD	CCPINKCN	Affidavit of James F Jacobson in Opposition to Defendant's Second Motion for Summary Judgment and Motion to Strike
	AFFD	CCPINKCN	Affidavit of Doug Schoon
	AFFD	CCPINKCN	Affidavit of Jeffrey L Chandler D.P.M.
	AFFD	CCPINKCN	Affidavit of Linda Cook
	MEMO	CCPINKCN	Plaintiff's Memorandum in Opposition to Defendant's Second Motion for Summary Judgment and Motion to Strike
7/10/2013	REPL	CCNELSRF	Def's Reply Memorandum RE: Motion strike and Motion for Summary Judgment and Response to Plf's Motion to Strike
7/11/2013	NOTS	CCSCOTDL	Notice Of Service
7/15/2013	DCHH	TCHOCA	Hearing result for Motion scheduled on 07/15/2013 10:00 AM: District Court Hearing Held Court Reporter: Tiffany Fisher Number of Transcript Pages for this hearing estimated: Motion To Strike/ 50
7/22/2013	MINE	TCHOCA	Email Correspondence and Plaintiff's Supplemental Memorandum
7/25/2013	ORDR	DCABBOSM	Order Granting Defendants' Motion for Summary Judgment on Count I
	CDIS	TCHOCA	Civil Disposition entered for: Peabody, Stacie, Defendant; Sales, Tracy, Plaintiff. Filing date: 7/25/2013
	STAT	TCHOCA	STATUS CHANGED: Closed

000004

Tracy Sales vs. Stacie Peabody, Linda Cook

Date	Code	User	Judge
8/5/2013	HRVC	TCHOCA	Hearing result for Civil Pretrial Conference scheduled on 08/05/2013 03:00 PM: Hearing Vacated
	NOTC	CCSCOTDL	Notice Vacating Deposition Duces Tecum of Linda Cook
8/6/2013	STIP	CCBOYIDR	Stipulation to Dismiss Linda Cook
8/7/2013	MISC	DCABBOSM	Rule 54(b) Certificate
	MOTN	CCKHAMSA	Plaintiff's Motion To Reconsider
	AFFD	CCKHAMSA	Affidavit Of James F. Jacobson In Support Of Plaintiff's Motion To Reconsider
	AFFD	CCKHAMSA	Affidavit Of Jeffrey L. Chandler, DPM In Support Of Plaintiff's Motion To Reconsider
	MEMO	CCKHAMSA	Plaintiff's Memorandum In Support Of Plaintiff's Motion To Reconsider
8/8/2013	CDIS	TCHOCA	Civil Disposition entered for: Sales, Tracy, Plaintiff; Cook, Linda, Defendant. Filing date: 8/8/2013
	HRVC	TCHOCA	Hearing result for Jury Trial scheduled on 08/26/2013 08:30 AM: Hearing Vacated 4 Days
	ORDR	TCWEGEKE	Order of Dismissal on Defendant Linda Cook Only
8/23/2013	MEMO	CCSWEECE	Defendants Stacie Peabody and Fingerprints Day Spas Memorandum in Opposition to Plaintiffs Motion for Reconsideration
9/3/2013	ORDR	DCABBOSM	Order Denying Plaintiff's Motion to Reconsider Prior Order Granting Summary Judgment on Count I
9/13/2013	MECO	MCBIEHKJ	Stacie Peabody and Fingerprints Day Spas Memorandum of Cost
9/19/2013	JDMT	DCABBOSM	Judgment
9/24/2013	APSC	CCTHIEBJ	Appealed To The Supreme Court
	NOTA	CCTHIEBJ	NOTICE OF APPEAL

NO. _____ FILED _____
A.M. _____ P.M. _____

APR 10 2012

CHRISTOPHER D. RICH, Clerk
By JOANNA ORTEGA
DEPUTY

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Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

TRACY SALES, individually;) Case No. CV PI **CV PI 1206516**
)
Plaintiff,)
)
vs.) **COMPLAINT**
)
STACIE PEABODY, individually and doing) **Fee Category: A.4.**
business under the assumed name of) **Fee: \$88.00**
FINGERPRINTS DAY SPA; and LINDA)
COOK, individually;)
)
Defendants.)
)
_____)

COMES NOW Plaintiff, Tracy Sales, by and through her attorneys of record,
Robert W. Jacobson and James F. Jacobson, Jacobson & Jacobson, PLLC, and complains
and alleges against the Defendants as follows:

PARTIES

I.

At all times material hereto, Plaintiff, Tracy Sales, (hereafter "Plaintiff,") was a resident of Boise, Ada County, Idaho.

II.

At all times material hereto, Defendant Stacie Peabody doing business under the assumed name of Finger Prints Day Spa, and was a resident of Boise, Ada County, Idaho. At all times relevant hereto Defendant Linda Cook was a resident of Ada County, Idaho.

JURISDICTION AND VENUE

III.

This Court has subject matter jurisdiction over this action pursuant to and by virtue of *Idaho Code* Section 1-705 and other applicable laws and rules. The claim exceeds the jurisdictional minimum of this Court of \$10,000.00.

IV.

This Court has personal jurisdiction over the above-named Defendants pursuant to and by virtue of *Idaho Code* Section 5-514.

V.

Defendants committed torts within the State of Idaho and caused injury to Plaintiff within the State of Idaho. Defendants also have substantial minimum contacts within the State of Idaho.

VI.

Venue is proper in Ada County pursuant to and by virtue of *Idaho Code* §5-404.

GENERAL FACTS

VII.

On or about April 19, 2010, Plaintiff was a customer at Defendant Peabody's facility, Finger Print Day Spa, and she had gone there for the purpose of obtaining a pedicure. Plaintiff's pedicure included various procedures on her feet and soaking her feet in basins used, maintained, and serviced at Defendant Peabody's facility. During the pedicure Plaintiff's right big toe was punctured or otherwise injured by an instrument or instruments being used to perform the pedicure. Defendant Linda Cook performed the pedicure on the date of the incident at Defendant Peabody's facility.

VIII.

Later, the cuticle and skin around the toe nail became red and swollen. Infection set in and Plaintiff's condition worsened, resulting in significant injury to Plaintiff, and Plaintiff required numerous treatments and procedures, including surgery.

COUNT I - NEGLIGENCE

IX.

Defendants, individually or jointly and severally, were negligent in causing injury and damage to Plaintiff as a result of the performance of the pedicure; in failing to warn Plaintiff of potential risks involved in the pedicure procedure and in failing to keep tools and instruments in a safe and usable condition to avoid injury or infection to Plaintiff and others for whom they performed pedicure procedures; and otherwise failing to maintain the premises, facility, equipment, and working conditions in a safe and reasonably prudent manner to avoid injury or infection to Plaintiff and others for whom they performed pedicure procedures.

X.

Plaintiff was injured and otherwise damaged as a direct result of the incident alleged herein, which injuries and damages were directly and proximately caused by Defendants' negligence.

XI.

By reason of said conduct of the Defendants and as a proximate result thereof, Plaintiff has suffered severe physical and economic injuries and other damages.

XII.

Plaintiff has also incurred expenses from past medical and related care, and is expected to incur additional expenses for care in the future.

XIII.

Plaintiff has also suffered damages including but not limited to physical pain and suffering, future physical pain and suffering, and loss of enjoyment of life.

COUNT II – RESPONDEAT SUPERIOR

XIV.

At all times relevant hereto, Defendant Linda Cook was acting as the agent and/or under the direction and/or control of Defendant Peabody in the performance of the pedicure; the use of equipment and tools to perform the pedicure; and the use of the facility, workspace, and other accoutrements used in the performance of the pedicure.

XV.

Defendant Peabody is vicariously liable for the actions, conduct, omissions, and negligence of Defendant Cook as set forth herein pursuant to the doctrine of *respondeat superior*.

COSTS AND ATTORNEY FEES FOR ALL COUNTS

XVI.

Plaintiff may be entitled to an award of reasonable attorney's fees and costs for the prosecution of this action. To the extent Plaintiff is so entitled; Plaintiff makes a claim for an award of reasonable attorney's fees and costs.

DEFAULT

XVII.

A reasonable amount for attorney fees and costs in the event of default is Two Thousand Five Hundred Dollars (\$2,500.00) or one-third (1/3) of the amount recovered, whichever is greater. In the event this matter is contested, Plaintiff should be awarded such other and further reasonable amount by the Court according to the laws of Idaho.

WHEREFORE, Plaintiff prays that the Court enter judgment against the Defendants, as follows:

1. For compensatory damages, for physical injuries sustained by Plaintiff for medical and related care, past and future;
2. For compensatory damages for Plaintiff regarding economic loss;

3. For amounts to compensate Plaintiff for damages including but not limited to physical pain and suffering, economic loss and loss of enjoyment of life;
4. For Plaintiff's costs and reasonable attorney fees incurred herein to the extent available by law; and
5. For costs of Court and such other and further relief as the Court deems just, and to which Plaintiff is entitled.

DATED this 10th day of April, 2012.

JACOBSON & JACOBSON, PLLC

By: Robert W. Jacobson
Robert W. Jacobson
Attorney for Plaintiff

OCT 11 2012

CHRISTOPHER D. RICH, Clerk
By ANNAMARIE MEYER
DEPUTY

Jeffrey P. Heineman
Heineman Law Office
1501 Tyrell Lane
Boise, Idaho 83706
Telephone: (208) 343-5687
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E-Mail jeff@heinemanlaw.com
ISB No. 7352

Attorney for Defendant Cook

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF ADA

TRACY SALES, an individual,

Plaintiff,

vs.

STACIE PEABODY, individually and doing
business under the assumed name of
FINGERPRINTS DAY SPA; and LINDA
COOK, individually,

Defendants.

Case No. CV-PI-1206516

ANSWER OF DEFENDANT LINDA
COOK TO PLAINTIFF'S
COMPLAINT

COMES NOW Defendant Linda Cook, by and through her counsel of record, Jeffrey P. Heineman, and submits her answer to the complaint filed by Plaintiff.

1. Defendant is without sufficient information or knowledge to admit or deny the allegations in paragraph I, and as such are denied.
2. Defendant is without sufficient information or knowledge to admit or deny the allegations set forth in the first sentence of paragraph II which reference

Defendant Stacie Peabody, and as such are denied. Defendant admits the allegations set forth in the second sentence of paragraph II.

3. Defendant admits the allegation set forth in the first sentence of paragraph III. Defendant is without sufficient information or knowledge to admit or deny the allegations set forth in the second sentence of paragraph III, and as such are denied.
4. Defendant denies the allegations set forth in paragraph IV except those allegations that constitute admissions on the part of Plaintiff.
5. Defendant denies the allegations set forth in the first sentence of paragraph V except those allegations that constitute admissions on the part of Plaintiff. Defendant is without sufficient information or knowledge to admit or deny the allegations set forth in the second sentence of paragraph V, and as such are denied.
6. Defendant admits the allegations in paragraph VI.
7. Defendant admits that she performed a pedicure on Plaintiff on or about April 19, 2010 in Defendant Peabody's facility as stated in paragraph VII. Defendant denies the remaining allegations set forth in paragraph VII except those allegations that constitute admissions on the part of Plaintiff.
8. Defendant is without sufficient knowledge to admit or deny the allegations set forth in paragraph VIII, and as such are denied.

COUNT I - NEGLIGENCE

9. Defendant denies the allegations set forth in paragraph IX except those allegations that constitute admissions on the part of Plaintiff.

10. Defendant denies the allegations set forth in paragraph X except those allegations that constitute admissions on the part of Plaintiff.
11. Defendant denies the allegations set forth in paragraph XI except those allegations that constitute admissions on the part of Plaintiff.
12. Defendant is without sufficient information or knowledge to admit or deny the allegations set forth in paragraph XII, and as such are denied.
13. Defendant is without sufficient information or knowledge to admit or deny the allegations set forth in paragraph XIII, and as such are denied.

COUNT II – RESPONDEAT SUPERIOR

14. Defendant is without sufficient knowledge to admit or deny the allegations set forth in paragraph XIV, and as such are denied.
15. Defendant is without sufficient knowledge to admit or deny the allegations set forth in paragraph XV, and as such are denied.

COSTS AND ATTORNEY FEES ON ALL COUNTS

16. Defendant denies the allegations set forth in paragraph XVI except those allegations that constitute admissions on the part of Plaintiff.

DEFAULT

17. Defendant denies the allegations set forth in paragraph XVII except those allegations that constitute admissions on the part of Plaintiff.

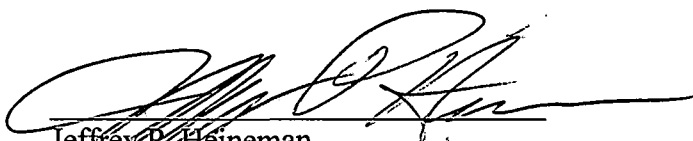
AFFIRMATIVE DEFENSES

1. Plaintiff's complaint is barred by assumption of risk.
2. Plaintiff's complaint is barred by her failure to mitigate of damages.

WHEREFORE, having answered Plaintiff's complaint, Defendant Linda Cook prays that the Court enter an order:

1. Dismissing Plaintiff's action;
2. Requiring Plaintiff to pay Defendant's costs and reasonable attorney incurred herein as available under law; and ,
3. For any further relief the Court finds just and equitable on behalf of Defendant Cook.

Dated this 11th day of October 2012.




Jeffrey P. Heineman,
Attorney for Plaintiff

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document was sent by United States mail, first class, postage prepaid, on October 11, 2012, to the below listed parties:

James F Jacobson
Robert W Jacobson
Jacobson & Jacobson, PLLC
660 E. Franklin Road, Suite 110
Meridian, Idaho 83642

David W. Knott
Carey Perkins LLP
PO Box 519
Boise, ID 83701-0519



Jeffrey P. Heineman, ISB 7352
Attorney for Linda Cook

ORIGINAL

Mood
Cindy
KT
11-5-12

David W. Knotts, ISB No. 3627
Tracy L. Wright, ISB No. 8060
CAREY PERKINS LLP
Capitol Park Plaza
300 North 6th Street, Suite 200
P. O. Box 519
Boise, Idaho 83701
Telephone: (208) 345-8600
Facsimile: (208) 345-8660

Attorneys for Defendants
Stacie Peabody dba
Finger Prints Day Spa

NOV 02 2012
FILED
446

NOV 02 2012

CHRISTOPHER D. RICH, Clerk
By KATHY BIEHL
Deputy

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

TRACY SALES, individually,

Plaintiff,

vs.

STACIE PEABODY, individually and
doing business under the assumed name
of FINGERPRINTS DAY SPA; and
LINDA COOK, individually,

Defendants.

Case No. CV PI 1206516

ANSWER AND DEMAND FOR JURY
TRIAL

Defendants Stacie Peabody and Fingerprints Day Spa ("Defendants"), by and
through their counsel of record, Carey Perkins LLP, hereby answer the Plaintiff's Complaint
as follows:

FIRST DEFENSE

Defendants deny each and every allegation of the Plaintiff's Complaint not

herein expressly and specifically admitted.

**SECOND DEFENSE AND ANSWER TO THE PARAGRAPHS
OF THE COMPLAINT**

1.

Defendants lack knowledge or information sufficient to form a belief as to the truth of ¶ 1.

2.

Defendants admit the first sentence of ¶ 2. Defendants lack knowledge or information sufficient to form a belief as to the truth of the second sentence of ¶ 2.

3.

In answer to ¶¶ 3 and 4, Defendants admit only that the Court has jurisdiction in this matter.

4.

Paragraph 5 states legal conclusions that require no response. To the extent any response is required, deny.

5.

Defendants admit ¶ 6.

6.

Defendants lack knowledge or information sufficient to form a belief as to the truth of ¶¶ 7 and 8.

7.

Paragraphs 9, 10, 11, 12, 13, 14, and 15 all state legal conclusions which require no response. To the extent any response is required, Defendants deny them. Defendants specifically deny that Defendant Linda Cook was at any time material hereto

acting under the direction and/or control of Defendants.

8.

Defendants deny ¶¶ 16 and 17.

9.

To the extent Plaintiff's "prayer for relief" asserts any allegations against Defendants that require a response, the same are denied.

AFFIRMATIVE AND OTHER DEFENSES

10.

By asserting these defenses, Defendants do not admit that they bear the burden of proof as to any of them.

11.

The Complaint fails to state a claim against Defendants upon which relief may be granted.

12.

The Plaintiff's claims against Defendants are barred in whole or in part by the doctrines of waiver and/or estoppel.

13.

The Plaintiff's claims against Defendants are barred in whole or in part by Plaintiff's failure to mitigate her damages, if any.

14.

The Plaintiff may not be the real party in interest with respect to all or part of her claims, contrary to Rule 17 of the Idaho Rules of Civil Procedure.

15.

The Plaintiff's damages, if any, were proximately caused, in whole or in part, by the contributory and/or comparative negligence and/or fault of the Plaintiff and/or persons or entities other than Defendants, as a result of which, the Plaintiff's claims against Defendants are barred in whole or in part.

16.

The Plaintiff's claims are barred in whole or in part by the fact that Plaintiff's damages, if any, were proximately caused, in whole or in part, by superseding and/or intervening acts or omissions of the Plaintiff and/or persons or entities other than Defendants, and/or by superseding and/or intervening forces other than those controlled by Defendants.

17.

The Plaintiff's claims are barred in whole or in part by the fact that Defendant Cook was an independent contractor, at all times material hereto.

18.

Defendants have been required to retain the services of attorneys to represent them herein. Defendants are entitled to recover reasonable attorney fees from Plaintiff pursuant to Idaho Code §§ 12-120, 12-121, and I.R.C.P. 54, and all other applicable provisions of Idaho law.

19.

Discovery is just beginning and Defendants reserve the right to amend this Answer and assert any additional affirmative defenses which are applicable and/or revealed during the discovery process.

PRAYER

WHEREFORE, Defendants pray for relief as follows:

1. That the Plaintiff take nothing by way of her Complaint, and that her claims against Defendants be dismissed with prejudice.
2. That Defendants be awarded their attorney fees and costs incurred in this action pursuant to all applicable law, including but not limited to, Idaho Code §§ 12-120, 12-121, and Rule 54 of the Idaho Rules of Civil Procedure.
3. That this Court award Defendants such other and further relief as it deems just and equitable in the premises.

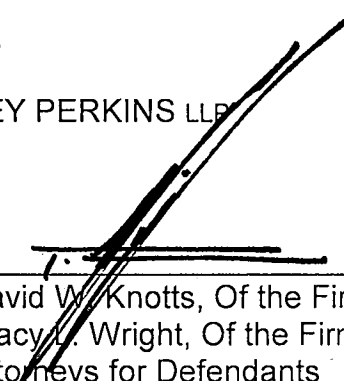
DEMAND FOR JURY TRIAL

Defendants demand a trial by jury of twelve (12) as to all issues.

DATED this 2nd day of November, 2012.

CAREY PERKINS LLP

By



David W. Knotts, Of the Firm
Tracy L. Wright, Of the Firm
Attorneys for Defendants
Stacie Peabody dba
Finger Prints Day Spa

CERTIFICATE OF SERVICE

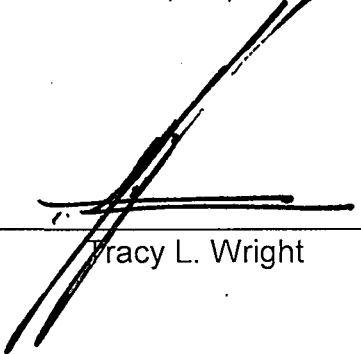
I HEREBY CERTIFY that on this 2nd day of November, 2012, I served a true and correct copy of the foregoing ANSWER AND DEMAND FOR JURY TRIAL by delivering the same to each of the following, by the method indicated below, addressed as follows:

James F. Jacobson
Robert W. Jacobson
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Meridian, Idaho 83642
Telephone: (208) 884-1995
Attorneys for Plaintiff

☒ U.S. Mail, postage prepaid
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☐ Overnight Mail
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Attorneys for Defendant Cook
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☒ U.S. Mail, postage prepaid
☐ Hand-Delivered
☐ Overnight Mail
☐ Facsimile (208) 947-9009



Tracy L. Wright

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Facsimile (208) 383-0412
ISBN No. 5903

Attorneys for Linda Cook

ORIGINAL

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRACY SALES, individually, Plaintiff, vs. STACIE PEABODY, individually and doing business under the assumed name of FINGERPRINTS DAY SPA; and LINDA COOK, individually, Defendants,	Case No. CV PI 1206516 AFFIDAVIT OF LINDA COOK
---	---

STATE OF IDAHO)
) ss.
County of Ada)

I, LINDA COOK, having first been duly sworn upon oath, states and avers as follows:

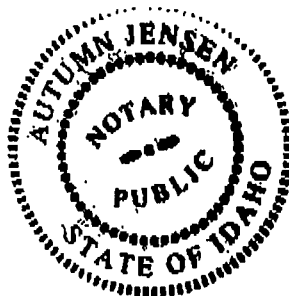
1. On or around April 19, 2010, I was leasing space from Stacie Peabody, who owned the space that housed Fingerprints Day Spa.
2. In exchange for weekly lease payments to Stacie Peabody, I was entitled to perform my spa services at Fingerprints Day Spa.
3. Under the leasing arrangement in 2010, I brought and used my own supplies, including nail implements.
4. During the time in question in 2010, I had full control over my business hours, my methods, and my tools and implements.
5. During the time in question, I scheduled my own appointments at the times of my choosing. Neither Stacie Peabody nor Fingerprints Day Spa had any control over whether and when I worked; nor did they supervise my services provided to the Plaintiff.
6. My weekly lease payments to Stacie Peabody did not change in amount depending on how much business I received each week.
7. During the time in question, Stacie Peabody received no share of my business income.

Further your Affiant sayeth naught.

Linda Cook

Linda Cook

SUBSCRIBED AND SWORN to before me this 20 day of April, 2013.



Autumn Jensen

Notary Public for Idaho

Residing at Boise

Commission expires 2/22/2016

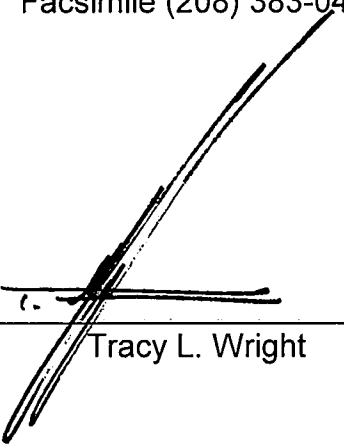
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of April, 2013, I served a true and correct copy of the foregoing AFFIDAVIT OF LINDA COOK by delivering the same to each of the following, by the method indicated below, addressed as follows:

James F. Jacobson	<input checked="" type="checkbox"/>	U.S. Mail, postage prepaid
Robert W. Jacobson	<input type="checkbox"/>	Hand-Delivered
JACOBSON & JACOBSON, PLLC	<input type="checkbox"/>	Overnight Mail
660 E. Franklin Rd., Ste. 110	<input type="checkbox"/>	Facsimile (208) 477-5210
Meridian, Idaho 83642		
Telephone: (208) 884-1995		
<i>Attorneys for Plaintiff</i>		

Jeffrey P. Heineman	<input checked="" type="checkbox"/>	U.S. Mail, postage prepaid
Heineman Law Office	<input type="checkbox"/>	Hand-Delivered
1501 Tyrell Lane	<input type="checkbox"/>	Overnight Mail
Boise, Idaho 83706	<input type="checkbox"/>	Facsimile (208) 947-9009
Telephone: (208) 343-5687		
<i>Attorneys for Defendant Cook</i>		

Margalit Z. Ryan	<input checked="" type="checkbox"/>	U.S. Mail, postage prepaid
Bauer & French	<input type="checkbox"/>	Hand-Delivered
ParkCenter Pointe	<input type="checkbox"/>	Overnight Mail
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Tracy L. Wright

David W. Knotts, ISB No. 3627
Tracy L. Wright, ISB No. 8060
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Telephone: (208) 345-8600
Facsimile: (208) 345-8660

Attorneys for Defendants
Stacie Peabody and
Finger Prints Day Spa

NO. _____
A.M. _____ P.M. 4:51

APR 25 2013

CHRISTOPHER D. RICH, Clerk
By JAMIE MARTIN
DEPUTY

ORIGINAL

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

TRACY SALES, individually,

Plaintiff,

vs.

STACIE PEABODY, individually and
doing business under the assumed name
of FINGERPRINTS DAY SPA; and
LINDA COOK, individually,

Defendants.

Case No. CV PI 1206516

DEFENDANTS STACIE PEABODY
AND FINGERPRINTS DAY SPA'S
MOTION FOR SUMMARY
JUDGMENT

COME NOW Defendants Stacie Peabody and Fingerprints Day Spa ("Defendants"), by and through their counsel of record, Carey Perkins LLP, and move this Court for entry of Summary Judgment dismissing this action against Defendants, on the grounds and for the reasons that there are no genuine issues of material fact and that these Defendants are entitled to judgment as a matter of law.

DEFENDANTS STACIE PEABODY AND FINGERPRINTS DAY SPA'S MOTION FOR
SUMMARY JUDGMENT - 1

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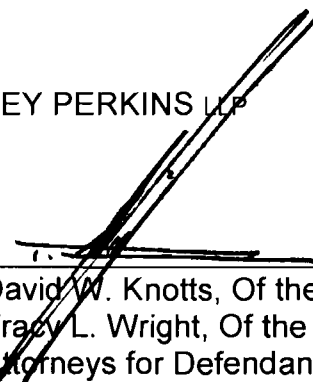
This Motion is based upon Rule 56 of the Idaho Rules of Civil Procedure, the Affidavit of Linda Cook, the Affidavit of Stacie Peabody, the Memorandum in Support of Defendants' Motion for Summary Judgment, filed contemporaneously herewith, and the files and records in the above-entitled action.

Oral argument is requested.

DATED this 25th day of April, 2013.

CAREY PERKINS LLP

By



David W. Knotts, Of the Firm
Tracy L. Wright, Of the Firm
Attorneys for Defendants
Stacie Peabody and
Finger Prints Day Spa

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of April, 2013, I served a true and correct copy of the foregoing DEFENDANTS STACIE PEABODY AND FINGERPRINTS DAY SPA'S MOTION FOR SUMMARY JUDGMENT by delivering the same to each of the following, by the method indicated below, addressed as follows:

James F. Jacobson
Robert W. Jacobson
JACOBSON & JACOBSON, PLLC
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Telephone: (208) 884-1995
Attorneys for Plaintiff

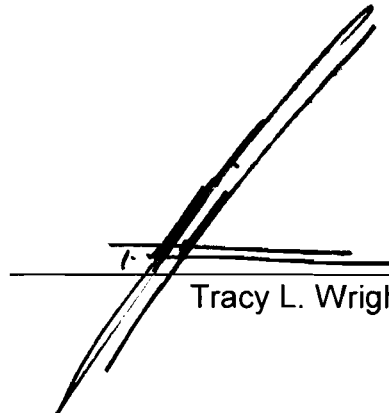
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Telephone: (208) 345-8600
Facsimile: (208) 345-8660

Attorneys for Defendants
Stacie Peabody and
Finger Prints Day Spa

NO. _____ FILED _____
A.M. _____ P.M. 4:51

APR 25 2013

CHRISTOPHER D. RICH, Clerk
By JAMIE MARTIN
DEPUTY

ORIGINAL

IN THE DISTRICT COURT OF
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TRACY SALES, individually,

Plaintiff,

vs.

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doing business under the assumed name
of FINGERPRINTS DAY SPA; and
LINDA COOK, individually,

Defendants.

Case No. CV PI 1206516

AFFIDAVIT OF STACIE PEABODY

STATE OF IDAHO)
 : ss.
County of Ada)

STACIE PEABODY, having first been duly sworn upon oath, deposes and
says:

1. At all times material hereto, including on or around April 19, 2010, I was the owner of Fingerprints Day Spa, a Defendant in this matter, and have personal knowledge of the business practices of Fingerprints Day Spa. At that time, Linda Cook was leasing space from me on the premises of Fingerprints Day Spa.

2. In exchange for weekly lease payments to me, Linda Cook was entitled to perform her spa services at Fingerprints Day Spa.

3. Under the leasing arrangement, Linda Cook brought and used her own supplies, including nail implements and sanitation equipment. Linda Cook had complete and full control over every aspect of her business, including her hours, her tools, and her sanitation procedures.

4. Under the leasing arrangement with Linda Cook, neither I nor Fingerprints Day Spa retained the right to control any aspect of Linda Cook's work and/or business practices.

5. Linda Cook scheduled her own appointments at the times of her choosing. I had no control over whether and when she worked.

6. Linda Cook's weekly lease payments to me did not change in amount depending on how much business she received each week.

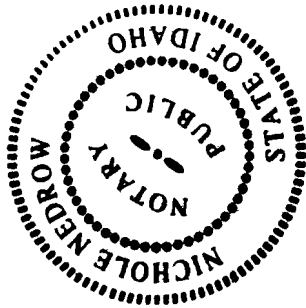
7. I received no share of Linda Cook's business income.

8. Neither Fingerprints Day Spa itself nor I provided any services to Plaintiff; nor did we supervise Ms. Cook in her providing any such services.

Further your Affiant saith naught.

Stacie Peabody
Stacie Peabody

SUBSCRIBED AND SWORN to before me this 27 day of March, 2013.



Nichole Nedrom
Notary Public for Idaho
Residing at Boise, ID
Commission expires 10/15/2015

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of April, 2013, I served a true and correct copy of the foregoing AFFIDAVIT OF STACIE PEABODY by delivering the same to each of the following, by the method indicated below, addressed as follows:

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Attorneys for Plaintiff

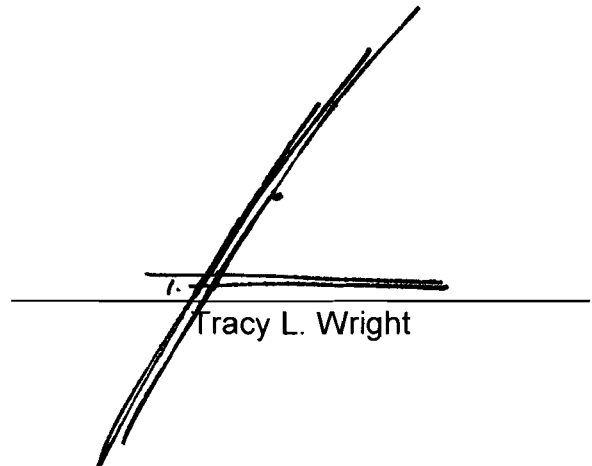
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Tracy L. Wright

NO. _____
A.M. _____ P.M. 4:51

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DEPUTY

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Attorneys for Defendants
Stacie Peabody and
Finger Prints Day Spa

ORIGINAL

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
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FOR THE COUNTY OF ADA

TRACY SALES, individually,

Plaintiff,

vs.

STACIE PEABODY, individually and
doing business under the assumed name
of FINGERPRINTS DAY SPA; and
LINDA COOK, individually,

Defendants.

Case No. CV PI 1206516

MEMORANDUM IN SUPPORT OF
DEFENDANTS STACIE PEABODY
AND FINGERPRINTS DAY SPA'S
MOTION FOR SUMMARY
JUDGMENT

I.
INTRODUCTION

This case involves allegations that nail services performed by Defendant Linda Cook allegedly resulted in injury and damages to the Plaintiff. In her Complaint, the Plaintiff alleged that Defendants Stacie Peabody and Fingerprints Day Spa (these "Defendants") should be held vicariously liable for Linda Cook's actions. However, no

MEMORANDUM IN SUPPORT OF DEFENDANTS STACIE PEABODY AND
FINGERPRINTS DAY SPA'S MOTION FOR SUMMARY JUDGMENT - 1

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employment or other relationship existed between Defendant Cook and these Defendants that possibly would give rise to vicarious liability.

At the time of the incident underlying this suit, on or around April 19, 2010, defendant Linda Cook was leasing space from these Defendants. **Aff. Stacie Peabody ¶ 1 (Mar. 27, 2013); Aff. Linda Cook ¶ 1 (April 25, 2013).** At that time, Ms. Peabody owned the property which housed Fingerprints Day Spa. **Aff. Stacie Peabody ¶ 1; Aff. Linda Cook ¶ 1.** Under the lease arrangement between Ms. Cook and these Defendants, Linda Cook paid a weekly sum to these Defendants in exchange for the right to use the space inside the salon, in the operation of her own business. **Aff. Stacie Peabody ¶ 2; Aff. Linda Cook ¶ 2.** Under this arrangement, Ms. Cook was obligated to bring and use her own supplies, including nail implements. **Aff. Stacie Peabody ¶ 3; Aff. Linda Cook ¶ 3.** Ms. Cook also had complete and full control over every aspect of her business, including her hours, her tools, and her own sanitation procedures, **Aff. Stacie Peabody ¶ 3, 4; Aff. Linda Cook ¶ 3, 4,** and she scheduled her own appointments at the times of her choosing. **Aff. Stacie Peabody ¶ 4; Aff. Linda Cook ¶ 4.** Ms. Cook's weekly lease payments to these Defendants did not change in amount depending on how much business Linda Cook received each week. **Aff. Stacie Peabody ¶ 5; Aff. Linda Cook ¶ 5.** These Defendants received no share of Linda Cook's business income. **Aff. Stacie Peabody ¶ 6; Aff. Linda Cook ¶ 6.** These Defendants did not provide any services to Plaintiff Tracy Sales, nor did these Defendants supervise Linda Cook in providing any such services. **Aff. Stacie Peabody ¶ 7; Aff. Linda Cook ¶ 4.**

The substance of the relationship between Ms. Cook and these Defendants has been attested to by both Ms. Peabody and Ms. Cook, which relationship amounted to that of lessor-tenant. The Plaintiff has not and cannot offer any evidence to the contrary. At most, there existed a principal-independent contractor relationship between these Defendants and Ms. Cook. Because the Plaintiff has not and cannot offer sufficient proof that an employment relationship existed between Ms. Cook and Ms. Peabody, she is unable to satisfy her burden of proof with regard to the elements of the causes of action she has asserted. Therefore, these Defendants respectfully request that the Court grant the instant Motion for Summary Judgment on all claims against these Defendants.

II. STANDARD OF REVIEW

Summary judgment should be granted if the Court determines that the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. ***City of Idaho Falls v. Home Indemnity Co.***, 126 Idaho 604, 606, 888 P.2d 383, 385 (1995); ***Bonds v. Sudweeks***, 119 Idaho 529, 541, 808 P.2d 876, 871 (1991). Idaho Rule of Civil Procedure 56(c) requires the entry of summary judgment against a non-moving party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which the party bears the burden of proof. ***Navarrette v. City of Caldwell***, 130 Idaho 849, 949 P.2d 597, 599 (Ct. App. 1997), citing ***State v. Shama Resources Limited Partnership***, 127 Idaho 267, 270, 899 P.2d 977, 980 (1995).

III. ARGUMENT

A. Linda Cook Was, at Most, an Independent Contractor

The basis for liability asserted by the Plaintiff is respondeat superior, based on an alleged agency relationship between Ms. Peabody and Ms. Cook. **Pl.'s Compl.** ¶ XIV, XV. Agency is "the manifestation of consent by one person to another that the other shall act on his behalf *and subject to his control*, and consent by the other so to act." Restatement (Second) Agency § 1, at 7 (1958)(emphasis added); ***Herbst v. Bothof Dairies, Inc.***, 110 Idaho 971, 973, 719 P.2d 1231, 1233 (Ct. App. 1986); *see also Sharp v. W.H. Moore, Inc.*, 118 Idaho 297, 796 P.2d 506 (1990)(Agency created where principal prescribed guidelines specifying how agent should do his job).

To impute liability to these Defendants, the Plaintiff must show more than that Ms. Cook was an "agent" of these Defendants:

[A] principal is liable only for the negligent acts of an agent "whose *physical conduct* in the performance of the service is controlled or is subject to the right of control...." *Second Restatement* [Agency] § 2(2)(1958) (emphasis added). This is a greater degree of control, or of right to control than is necessary to establish a principal-agent relationship. It is more akin to the control found in a master-servant relationship.

Herbst, 110 Idaho at 974, 719 P.2d at 1234.

As provided further by the Restatement (Second) of Agency, §§ 1 and 2, cited with approval in ***Herbst***, "[e]very master is a principal but not every principal is a master. Likewise, every servant is an agent, but not every agent is a servant." See ***Herbst***, 110 Idaho at 974, n. 2, 719 P.2d at 1234. Accordingly, the Plaintiff is required to

prove that these Defendants asserted sufficient control over Ms. Cook such that Ms. Cook's relationship with these Defendants was "akin to" a master-servant relationship.

From the facts above, the relationship between these Defendants and Ms. Cook was merely that of lessor-lessee. Thus, this is no basis for imposing vicarious liability. See ***Olin v. Honstead***, 60 Idaho 211, 91 P.2d 380 (1939).

At most, Ms. Cook was in an independent contractor relationship vis-a-vis these Defendants¹. An independent contractor is a person who is retained to accomplish certain results and who does not work subject to the control of the person who retained her. ***Anderson v. Farm Bureau Mutual Insurance Co. of Idaho***, 112 Idaho 461, 464-65, 732 P.2d 699, 702-3 (Ct. App. 1987)(overturned on other grounds).

In ***Anderson***, the Idaho Court of Appeals examined several factors that earmark an independent contractor:

The person employed (a) is engaged in an independent business, calling, or occupation; (b) is to have the independent use of his special skill, knowledge, or training in the execution of work; (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he may think proper; (g) has full control over such assistants; and (h) selects his own time.

112 Idaho at 465, 732 P.2d at 703. Applying these factors, the Court held that an insurance "agent" was an independent contractor because he kept his own hours, chose his own vacation dates, hired his own clerical help, purchased his own equipment, was paid on a commission basis, and filed his own tax returns. ***Id.***

¹By arguing in the alternative, these Defendants do not concede that theirs was such a relationship.

Similarly, in ***Simpkins v. Southwestern Idaho Painters District Council***, 95 Idaho 165, 505 P.2d 313 (1973), carpet layers were found to be independent contractors where they operated their own business for profit, supplied their own tools, and received payment according to the yardage of carpet laid. Other than to specify the carpet to be laid and the trim to be used, the person who hired them did not supervise the details of the carpet installation. 95 Idaho at 170, 505 P.2d at 318.

The key to whether an actor is an independent contractor is whether the principal controls the means and mode of doing the work contracted for. See ***Joslin v. Idaho Times Publishing Co.***, 56 Idaho 242, 253-54, 53 P.2d 323, 328 (1935) (“The chief consideration which determines one to be an independent contractor is the fact that the employer has no right of control as to the mode of doing the work contracted for.”); ***Indiana Iron Co. v. Cray***, 19 Ind. App. 565, 48 N.E. 803 (quoted with approval in ***Joslin v. Idaho Times Publishing Co.***)(“when the person employing may prescribe what shall be done, but not how it is to be done, or who is to do it, the person so employed is a contractor, and not a servant”). In ***Joslin v. Idaho Times Publishing Co.***, the Court considered whether a paper delivery boy who was involved in a collision with a pedestrian, was an independent contractor. Reasoning that the testimony of the delivery boy, and another delivery boy, showed that the instructions were given as to what they were to do, where they were to do it, when they were to do it, but not how, the court found that there was insufficient evidence of a master-servant relationship to support the jury’s verdict based on vicarious liability. 56 Idaho 242, 53 P.2d 323.

Comparing the facts in ***Joslin*** to those in the case at bar, this case presents an even clearer example of an independent contractor relationship because, unlike in

Joslin, here Ms. Cook chose when and if she wanted to work, as well as how she worked. See **Joslin v. Idaho Times Publishing Co.**, 56 Idaho at 253-54, 53 P.2d at 328.

Furthermore, in this case, all of the **Anderson** elements are present. Here, Ms. Cook was engaged in an independent business, the business of providing personal beauty services. Ms. Cook had independent use of her special knowledge as a nail technician or manicurist to promote her business and garner positive word of mouth. Ms. Cook performed the specified work of manicures/pedicures for a fixed price. Ms. Cook was not subject to discharge because she adopted one method of performing manicures and pedicures over another. Ms. Cook was not in the regular employ of these Defendants, and was free to use any assistants she desired, and to exert full control over those assistants. Finally, Ms. Cook was in complete control of her own schedule, selecting the hours she wanted to work and the customers she wanted to take. As in **Simkins**, these Defendants did not supervise the details of the way that Ms. Cook ran her business or provided service to her customers.

Given the facts of this case and the nature of the relationship between these Defendants and Linda Cook, if there was a relationship between these Defendants and Ms. Cook beyond a lessor-lessee relationship, it was, at most, that of a principal and an independent contractor. Such a relationship does not support imposing vicarious liability on these Defendants.

B. As the Principal, These Defendants Should Not Be Held Liable for the Acts of Independent Contractor Linda Cook

As a general rule, a principal is not liable for the negligence of an independent contractor in performing the contracted services. **Brown v. City of Pocatello**,

148 Idaho 802, 811, 229 P.3d 1164, 1173 (2010); *see also Jones v. HealthSouth Treasure Valley Hosp.*, 147 Idaho 109, 113, 206 P.3d 473, 477 (2009); *see also Estate of Cordero v. Christ Hosp.*, 403 N.J. Super. 306, 958 A.2d 101, 104 (N.J. Super. Ct. App. Div. 2008)(quoted favorably by *Jones v. HealthSouth Treasure Valley Hosp.*). The most widely accepted explanation for this rule is that since the principal has no right of control over the manner in which the independent contractor's work is to be done, the contractor, rather than the principal, is the proper party to be charged with the responsibility for preventing the risk, and bearing and distributing it. *Gneiting v. Idaho Asphalt Supply*, 130 Idaho 393, 394-395 (Idaho Ct. App. 1997).

In this case, these Defendants had no right of control over the manner in which Ms. Cook performed her work. Therefore, applying the *Gneiting* court's reasoning, it would be inappropriate to charge these Defendants with the responsibility for preventing harm to one of Ms. Cook's customers.

Furthermore, under the *Gneiting* decision, if these Defendants are not properly charged with the responsibility for preventing harm to one of Ms. Cook's customers, then, by law, they do not have a duty to Ms. Cook's customers, to protect them from alleged negligence by Ms. Cook. Because the Plaintiff bears the burden of proving the element of duty as part of her negligence claim (based on vicarious liability), and, in accordance with Idaho case authority, she cannot make that showing, these Defendants are entitled to a grant of summary judgment in their favor, and a dismissal of all of the Plaintiff's claims against them.

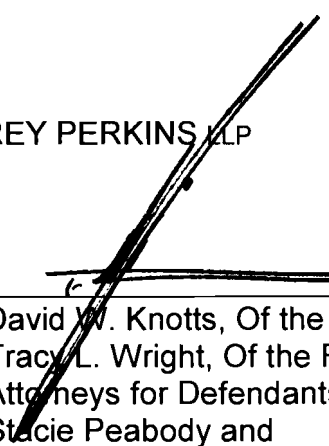
**IV.
CONCLUSION**

Based on the foregoing, these Defendants respectfully request that the Court grant their Motion for Summary Judgment and dismiss all of the Plaintiff's claims against them.

DATED this 25th day of April, 2013.

CAREY PERKINS LLP

By



David W. Knotts, Of the Firm
Tracy L. Wright, Of the Firm
Attorneys for Defendants
Stacie Peabody and
Finger Prints Day Spa

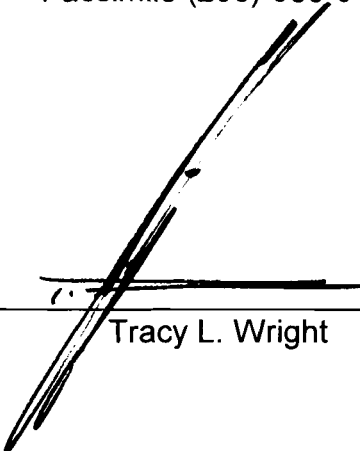
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of April, 2013, I served a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF DEFENDANTS STACIE PEABODY AND FINGERPRINTS DAY SPA'S MOTION FOR SUMMARY JUDGMENT by delivering the same to each of the following, by the method indicated below, addressed as follows:

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Attorneys for Plaintiff

NO. _____
A.M. _____ FILED P.M. 313
MAY 14 2013
CHRISTOPHER D. RICH, Clerk
By CHRISTINE SWEET
DEPUTY

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

TRACY SALES, individually;

Plaintiff,

vs.

STACIE PEABODY, individually and doing
business under the assumed name of
FINGERPRINTS DAY SPA; and LINDA
COOK, individually;

Defendants.

Case No. CV PI 1206516

**AFFIDAVIT OF JAMES F.
JACOBSON IN OPPOSITION TO
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

STATE OF IDAHO)
) ss:
County of Ada)

JAMES F. JACOBSON, being first duly sworn deposes and says upon oath:

1. That he is an attorney for Plaintiff in the above-entitled action, and that he is competent to testify as to the matters contained herein. This affidavit is submitted in opposition to Defendant's Motion for Summary Judgment.

2. That attached hereto as Exhibit A is true and correct copy of the deposition of Stacie Peabody taken in this action on March 27, 2013.

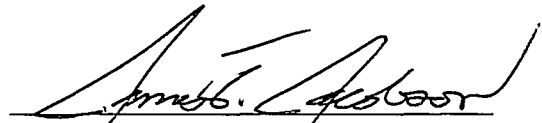
3. That attached hereto as Exhibit B is true and correct copy of selected portions of the deposition of Tracy Sales taken in this action on January 29, 2013.

4. That attached hereto as Exhibit C is a true and correct copy of the expert report of Doug Schoon produced in this action on May 10, 2013.

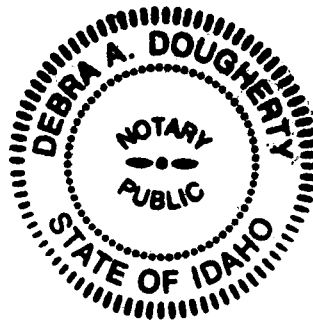
5. That attached hereto as Exhibit D are true and correct copies of inspection reports pertaining to Stacie Peabody and Fingerprints Day Spa that were produced pursuant to my subpoena in this action to the records custodian of the Idaho State Bureau of Occupational Licenses.

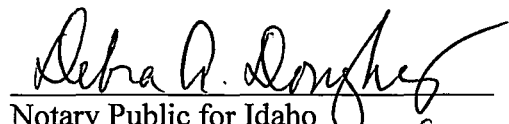
6. That attached hereto as Exhibit E is a true and correct copy of the expert opinions of Dr. Jeffrey Chandler that were produced in this action on May 10, 2013.

FURTHER, your Affiant sayeth naught.


James F. Jacobson

SUBSCRIBED AND SWORN to before me this 14th day of May, 2013.




Notary Public for Idaho
Residing at Eagle, Idaho
My Commission expires: 10-22-16

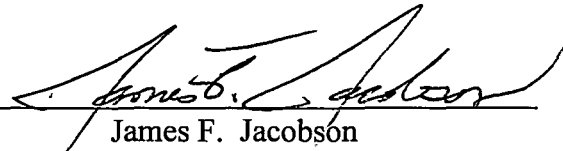
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of May, 2013, a true and correct copy of the foregoing was served upon the follow attorneys of record via method below:

David W. Knotts; Tracy L. Wright	<input type="checkbox"/>	U.S. Mail, postage prepaid
Carey Perkins, LLP	<input checked="" type="checkbox"/>	Hand-Delivered
Capitol Park Plaza	<input type="checkbox"/>	Overnight Mail
300 N. 6 th Street, Ste. 200	<input type="checkbox"/>	Facsimile (208) 529-0005
P. O. Box 519		
Boise, ID 83701		
<i>Attorneys for Defendant, Stacie Peabody and Fingerprints Day Spa</i>		

Jeffrey P. Heineman	<input type="checkbox"/>	U.S. Mail, postage prepaid
Heineman Law Office	<input checked="" type="checkbox"/>	Hand-Delivered
1501 Tyrell Lane	<input type="checkbox"/>	Overnight Mail
Boise, ID 83706	<input type="checkbox"/>	Facsimile (208) 947-9009
<i>Attorney for Defendant, Linda Cook</i>		

Margalit Z. Ryan	<input type="checkbox"/>	U.S. Mail, postage prepaid
Bauer & French	<input checked="" type="checkbox"/>	Hand-Delivered
P. O. Box 2730	<input type="checkbox"/>	Overnight Mail
Boise, ID 83701	<input type="checkbox"/>	Facsimile (208) 383-0412
<i>Attorney for Defendant, Linda Cook</i>		


James F. Jacobson

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRACY SALES, individually,)
 Plaintiff,)
 vs.) Case No. CV PI 1206516
STACIE PEABODY, individually)
and doing business under the)
assumed name of FINGERPRINTS)
DAY SPA; and LINDA COOK,)
individually;)
 Defendants.)

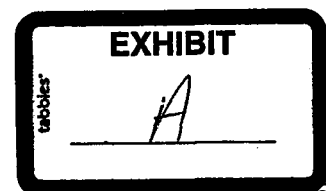
DEPOSITION OF STACIE PEABODY

MARCH 27, 2013

REPORTED BY:

EMILY L. NORD, CSR No. 695, RPR

Notary Public



000045

Stacie Peabody 3/27/2013

<p style="text-align: right;">Page 2</p> <p>1 THE DEPOSITION OF STACIE PEABODY was taken on</p> <p>2 behalf of the Plaintiff at the offices of Carey Perkins,</p> <p>3 LLP, Capitol Park Plaza, 300 N. 6th Street, Suite 200,</p> <p>4 Boise, Idaho, commencing at 9:11 a.m. on Wednesday,</p> <p>5 March 27, 2013, before Emily L. Nord, Certified</p> <p>6 Shorthand Reporter and Notary Public within and for the</p> <p>7 State of Idaho, in the above-entitled matter.</p> <p>8</p> <p>9 APPEARANCES</p> <p>10</p> <p>11 For the Plaintiff Tracy Sales:</p> <p>12 Jacobson & Jacobson, PLLC</p> <p>13 BY MR. JAMES F. JACOBSON</p> <p>14 660 E. Franklin Road, Suite 110</p> <p>15 Meridian, ID 83642</p> <p>16</p> <p>17 For the Defendant Stacie Peabody and Fingerprints Day Spa:</p> <p>18 Carey Perkins, LLP</p> <p>19 BY MR. TRACY L. WRIGHT</p> <p>20 Capitol Park Plaza</p> <p>21 300 N. 6th Street, Suite 200</p> <p>22 P.O. Box 519</p> <p>23 Boise, ID 83701</p> <p>24</p> <p>25 Also Present: Tracy Sales; Marc Bybee, intern</p>	<p style="text-align: right;">Page 4</p> <p>1 STACIE PEABODY,</p> <p>2 first duly sworn to tell the truth relating to said</p> <p>3 cause, testified as follows:</p> <p>4</p> <p>5 MR. JACOBSON: Let the record reflect this is</p> <p>6 the time and place pursuant to notice for the taking of</p> <p>7 the deposition of Stacie Peabody, pursuant to the Idaho</p> <p>8 Rules of Civil Procedure.</p> <p>9</p> <p>10 EXAMINATION</p> <p>11 QUESTIONS BY MR. JACOBSON:</p> <p>12 Q. Ms. Peabody, have you ever had your deposition</p> <p>13 taken before?</p> <p>14 A. No, sir.</p> <p>15 Q. I am sure that your attorney has oriented you,</p> <p>16 to some degree, as to what this process is going to be</p> <p>17 like. Let me go over -- which is a very basic, standard</p> <p>18 thing -- some rules and procedures that will help to</p> <p>19 make this process as smooth as possible.</p> <p>20 During the course of the deposition, the court</p> <p>21 reporter will be taking down what we say, my questions</p> <p>22 and your answers to those.</p> <p>23 A. Okay.</p> <p>24 Q. If there is a question that you don't</p> <p>25 understand, if you would let me know, and then I can</p>
<p style="text-align: right;">Page 3</p> <p>1 INDEX</p> <p>2</p> <p>3 TESTIMONY OF STACIE PEABODY PAGE</p> <p>4 Examination by Mr. Jacobson 4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10 EXHIBITS</p> <p>11 (No exhibits were marked.)</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">Page 5</p> <p>1 either restate or rephrase or repeat the question in a</p> <p>2 way that helps you to better understand that. Is that</p> <p>3 okay?</p> <p>4 A. Absolutely.</p> <p>5 Q. In responding to my questions, you'll want to</p> <p>6 use audible words, such as yes and no, as opposed to</p> <p>7 sounds or gestures; which, while we typically use those</p> <p>8 when we converse, are very difficult for the court</p> <p>9 reporter to take down or create a record that's unclear.</p> <p>10 Is that okay?</p> <p>11 A. Yes.</p> <p>12 Q. If at any time you need to take a break,</p> <p>13 that's fine, and we can do that. If I have asked a</p> <p>14 question, then you'll need to answer that question</p> <p>15 before we take the break. Do you understand?</p> <p>16 A. Yes.</p> <p>17 Q. Great. And then is there anything today that</p> <p>18 would prohibit or inhibit you from giving complete and</p> <p>19 accurate answers in your deposition today?</p> <p>20 A. No.</p> <p>21 Q. All right. With that, then, we'll go ahead</p> <p>22 and proceed.</p> <p>23 My understanding is that you're the owner of a</p> <p>24 business called Fingerprints Day Spa; is that correct?</p> <p>25 A. Yes.</p>

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<p>1 Q. And Fingerprints Day Spa is actually an</p> <p>2 assumed business name or a DBA; right?</p> <p>3 A. Yes.</p> <p>4 Q. And, really, the business is you; you're the</p> <p>5 owner of the business?</p> <p>6 A. Yes.</p> <p>7 Q. And you have not incorporated the business at</p> <p>8 any time, have you?</p> <p>9 A. It is incorporated.</p> <p>10 Q. It is incorporated now?</p> <p>11 A. It's always been incorporated.</p> <p>12 Q. When you say "incorporated," what do you</p> <p>13 understand that to mean?</p> <p>14 A. Tax breaks.</p> <p>15 Q. So the business gets tax breaks?</p> <p>16 A. Yes.</p> <p>17 Q. Okay. But in terms of a filing with the</p> <p>18 Secretary of State for the State of Idaho, the only</p> <p>19 filing has been the assumed business name; right?</p> <p>20 A. Well, I go by "Fingerprints, Inc."</p> <p>21 Q. You go by "Fingerprints, Inc."?</p> <p>22 A. Yeah. That's what -- yes.</p> <p>23 Q. Okay. That's the assumed business name that</p> <p>24 you're saying is filed with the Secretary of State?</p> <p>25 A. I'm not sure. That's what it says on my</p>	<p>1 Q. -- spell that?</p> <p>2 A. No. Can you?</p> <p>3 Q. I'm just trying to help Madam Court Reporter</p> <p>4 by having you spell that.</p> <p>5 A. We can just say "professional skin care."</p> <p>6 Q. And that's what an esthetician is?</p> <p>7 A. Esthetician, correct.</p> <p>8 Q. Okay. And so those are the services that</p> <p>9 Fingerprints has provided over the last five years?</p> <p>10 A. Yes.</p> <p>11 Q. What does an esthetician do?</p> <p>12 A. Skin care.</p> <p>13 Q. I mean more specifically. You said</p> <p>14 "professional skin care." What specifically do they do?</p> <p>15 A. Well, I'm not exactly sure. I'm not an</p> <p>16 esthetician.</p> <p>17 Q. What is your training and background with</p> <p>18 respect to --</p> <p>19 A. I'm a nail technician.</p> <p>20 Q. Is there a licensure that you have to get in</p> <p>21 order to be a nail technician in Idaho?</p> <p>22 A. Yes.</p> <p>23 Q. What is that licensure process?</p> <p>24 A. Going to school, getting an education, passing</p> <p>25 the State test, and staying current in your license.</p>
Page 7	Page 9
<p>1 checkbook.</p> <p>2 Q. All right. Anything else that you've done, by</p> <p>3 way of filings with the Secretary of State, besides the</p> <p>4 assumed business name?</p> <p>5 A. No.</p> <p>6 Q. How long have you owned this business,</p> <p>7 Fingerprints Day Spa?</p> <p>8 A. Probably about 25 years.</p> <p>9 Q. And during that period, has the business been</p> <p>10 located only in Boise, or has it been located other</p> <p>11 places?</p> <p>12 A. Boise.</p> <p>13 Q. And you've been the only owner of the business</p> <p>14 throughout that period; is that right?</p> <p>15 A. Yes.</p> <p>16 Q. And what is it that Fingerprints Day Spa does?</p> <p>17 What services or products do they provide to people?</p> <p>18 A. It's varied over the years.</p> <p>19 Q. In the last five years, what has it been like?</p> <p>20 A. We have had nail technicians, hairdressers,</p> <p>21 and estheticians and massage therapists.</p> <p>22 Q. You said one word that I don't recognize.</p> <p>23 A. Esthetician?</p> <p>24 Q. Esthetician. Could you --</p> <p>25 A. Skin care --</p>	<p>1 Q. What do you have to do to stay current in your</p> <p>2 license?</p> <p>3 A. Pay your fees.</p> <p>4 Q. Any education requirements?</p> <p>5 A. No.</p> <p>6 Q. Just simply paying the fee to the State?</p> <p>7 A. Paying the fee to the State.</p> <p>8 Q. Do any of the other services that Fingerprints</p> <p>9 has offered, those that you listed off, do they require</p> <p>10 State licensure beyond being a nail technician?</p> <p>11 A. Absolutely.</p> <p>12 Q. Which ones require licensure?</p> <p>13 A. To be an esthetician, it requires a license.</p> <p>14 To be a cosmetologist requires a license.</p> <p>15 Massage therapy does not require a license;</p> <p>16 however, I've never leased to anyone that did not have a</p> <p>17 license. So I ask that my massage therapists also be</p> <p>18 licensed. But that is not a requirement of the State of</p> <p>19 Idaho.</p> <p>20 Q. But the State has a licensure process for</p> <p>21 massage therapy even though it is not required?</p> <p>22 A. Yes, it does.</p> <p>23 Q. Okay. Where was the business located,</p> <p>24 Fingerprints Day Spa's business located back in 2010?</p> <p>25 A. 1414 Broadway Avenue.</p>

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<p>1 Q. Is it still located at that same place?</p> <p>2 A. No, it is not.</p> <p>3 Q. Where has it moved to now?</p> <p>4 A. The salon is closed, and has been for two</p> <p>5 years.</p> <p>6 Q. Do you remember approximately the date that</p> <p>7 the salon closed?</p> <p>8 A. I'm sorry, I don't.</p> <p>9 Q. Just approximately, month and year.</p> <p>10 A. Maybe March 2010. Maybe. I think it's been</p> <p>11 two years now.</p> <p>12 Q. Okay. That would be March of 2011, two years</p> <p>13 ago?</p> <p>14 A. Yeah.</p> <p>15 Q. Is that correct?</p> <p>16 A. '11, yeah. It's '13. Sorry.</p> <p>17 Q. That's okay.</p> <p>18 A. I'm still a year off.</p> <p>19 Q. That's okay.</p> <p>20 A. It's the time change.</p> <p>21 Q. Me too. Me too.</p> <p>22 What aspect of Fingerprints is still open?</p> <p>23 What services are you providing now?</p> <p>24 A. I do manicuring and pedicuring services at my</p> <p>25 home, where my name has still followed me, Fingerprints.</p>	<p>1 Q. And the chair for the hair station, was it</p> <p>2 just an ordinary chair like what you're sitting in now,</p> <p>3 or did it have any special features to it?</p> <p>4 A. It would be just like the chair you sit in</p> <p>5 when you get your hair cut. I'm sure you've been to a</p> <p>6 salon.</p> <p>7 Q. A long time ago. As you can see by my</p> <p>8 haircut, it's not complicated.</p> <p>9 A. Your wife does a good job.</p> <p>10 Q. Thank you. Thank you. I don't look as sharp</p> <p>11 as Tracy does.</p> <p>12 Now, what about a nail station; what goes into</p> <p>13 a nail station?</p> <p>14 A. I leased out vented nail tables, a chair, a</p> <p>15 stand, and a phone that goes on the stand, and pedicure</p> <p>16 chairs.</p> <p>17 Q. What is a vented nail station? Describe for</p> <p>18 me what that looks like and what it does.</p> <p>19 A. It looks like a desk with drawers that pulls</p> <p>20 nail dust down so it's not, you know, in the client's</p> <p>21 face.</p> <p>22 Q. Any other special features?</p> <p>23 A. No.</p> <p>24 Q. What about this pedicure station that you just</p> <p>25 described; describe that for me in more detail. What</p>
Page 11	Page 13
<p>1 Q. And is there anybody else that offers services</p> <p>2 there at your home now?</p> <p>3 A. No. And it's not my home. I have a salon</p> <p>4 established, that's licensed and inspected by the State</p> <p>5 every year, behind my house. So it has a separate</p> <p>6 entrance and all that. It's just located where my home</p> <p>7 is.</p> <p>8 Q. Is it a completely separate structure from</p> <p>9 your home?</p> <p>10 A. No.</p> <p>11 Q. It is attached, but it's got a separate</p> <p>12 entrance?</p> <p>13 A. A separate entrance. And complies with all of</p> <p>14 the State regulations for a home salon.</p> <p>15 Q. Back in 2010, when Fingerprints was located at</p> <p>16 the other location that you referenced, could you</p> <p>17 describe for me the layout of the salon? And if it</p> <p>18 would help, I can have you draw it.</p> <p>19 A. Oh. Well, it was pretty basic. There were</p> <p>20 three hair stations, and three to four nail stations,</p> <p>21 and three treatment rooms downstairs.</p> <p>22 Q. What is a hair station? When you say "hair</p> <p>23 station," what did that entail?</p> <p>24 A. A sink, shelving for storage of products, and</p> <p>25 the chair.</p>	<p>1 features does it have?</p> <p>2 A. A massage chair that has a foot basin.</p> <p>3 Q. A massage chair with a foot basin?</p> <p>4 A. Correct.</p> <p>5 Q. And what's the purpose of this foot basin?</p> <p>6 A. For doing pedicures.</p> <p>7 Q. Would people put their feet into the basin?</p> <p>8 Is that how that works?</p> <p>9 A. Uh-huh. Yes.</p> <p>10 Q. And I know that some of my questions may seem</p> <p>11 a little, kind of, simplistic in nature, but it's just</p> <p>12 to help me understand and to create a record to describe</p> <p>13 this.</p> <p>14 How big would these foot basins be?</p> <p>15 A. Oh, two feet by three feet, I believe.</p> <p>16 Q. And was it just an empty basin, or was it</p> <p>17 filled with something?</p> <p>18 A. Well, it was an empty basin until we filled it</p> <p>19 with water, and then it was filled with water.</p> <p>20 Q. And where would the water come from?</p> <p>21 A. The faucet.</p> <p>22 Q. When you say "the faucet," would someone take</p> <p>23 a bucket, put it under a faucet somewhere, and then dump</p> <p>24 it into the basin? Is that how that worked?</p> <p>25 A. No. They're professional chairs. They have</p>

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<p>1 running water drains, the whole nine yards, jets, all 2 that. 3 Q. Okay. And all of that is part of this basin? 4 A. Correct. 5 Q. And how many of these pedicure stations did 6 you have back in 2010? 7 A. Two. 8 Q. Two. Now, all of this equipment that you have 9 just described that was part of the salon back in 2010, 10 you owned all of this equipment; is that right? 11 A. Yes. 12 Q. Do you recall the manufacturer's name as to 13 these pedicure stations? 14 A. Swan. 15 Q. And did they manufacture the full station, or 16 did they manufacture only part of it? 17 A. No, it's a one-unit. 18 Q. How would you describe yourself as a business 19 owner? Would you say you were hands-on or hands-off? 20 MR. WRIGHT: Object to the form. 21 You can answer. 22 THE WITNESS: In what regard are you talking 23 about? I am unclear as to the question. 24 Q. (BY MR. JACOBSON) Sure. As a business owner, 25 did you want to be involved in the day-to-day details of</p>	<p>1 I was personally doing the service. That's when I was 2 involved in a pedicure. If it was myself, working on my 3 client. 4 Q. Tell me about your daily routine, then, back 5 in 2010. How would a typical day go for you? 6 A. Well, I would get up, brush my teeth, get 7 dressed for work, take my kids to school, go to work, 8 check the phone, return calls that pertained to me 9 personally, and worked on my clients, and went home. 10 Q. About when would you get to work? 11 A. It depended. Usually around 8:00 or 9:00. 12 Q. And how long would you be there during the 13 day? 14 A. It depended. However long my appointments 15 lasted. 16 Q. What was a typical day? 17 A. 8:00 to 5:00, or 6:00, or 7:00. It depended. 18 Q. Depended on what appointments that you had? 19 A. Correct. 20 Q. How frequently would you try to schedule 21 appointments, then? 22 A. Every hour on the hour. 23 Q. And how long would it take you, typically, to 24 service an appointment? 25 A. It would depend on the appointment.</p>
Page 15	Page 17
<p>1 the business, or were you someone that said, look, I'm 2 just -- I'm looking at the big picture? 3 A. No -- 4 MR. WRIGHT: Object to the form. 5 THE WITNESS: I can answer it. 6 I attended to my own clients. I have my own 7 clients. I answer my own phone calls. I take care of 8 my clients. That's what I did, on a daily business, as 9 I went to work to service my clientele, people that were 10 on my appointment book. 11 Q. (BY MR. JACOBSON) So if I'm understanding you 12 right, if they weren't your clients, they weren't your 13 appointment, you weren't concerned about what was 14 going -- 15 A. No. 16 Q. -- on? 17 You said that you had licensure as a nail 18 technician; is that right? 19 A. Correct. 20 Q. And is that exclusively what you did, or did 21 you do anything else? 22 A. That's all I did. 23 Q. And so you weren't involved in any of these 24 pedicure stations, as far as you working? Or were you? 25 A. No. I was, if my client sat in the chair and</p>	<p>1 Q. Typically? 2 A. An hour. 3 Q. So you tried to space them an hour apart, and 4 it would typically take you an hour, then, to service? 5 A. Yes. 6 Q. How often were you not there? And this is, 7 again, back in 2010, approximately. Did you have 8 regular intervals where you weren't at the salon? 9 A. Yes. 10 Q. How often would those occur? What were those 11 intervals? 12 A. Well, I was in a car accident, and there were 13 times that I was not in the shop for a month or two or 14 three. 15 Q. You were in an automobile accident in -- 16 A. Correct. 17 Q. -- 2010? 18 A. Correct. 19 Q. When were you in this -- 20 A. No, it was not in 2010. I was just having a 21 surgery as a result from a car accident. 22 Q. When did you have your surgery in 2010? 23 A. Oh, I don't know the exact date. 24 Q. Approximately, month? 25 A. Again, I don't know.</p>

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<p>1 Q. Was it at the beginning of the year or the end</p> <p>2 of the year?</p> <p>3 A. I think the beginning.</p> <p>4 Q. And how much time did you miss as a result of</p> <p>5 the surgery?</p> <p>6 A. Again, I'm unclear why this line of</p> <p>7 questioning is happening.</p> <p>8 Q. That's okay. Just if you know the answer, you</p> <p>9 can answer it.</p> <p>10 A. Well, it would depend, you know. I think at</p> <p>11 one point I missed three to four months of work.</p> <p>12 Q. Is that three to four months straight?</p> <p>13 A. Correct.</p> <p>14 Q. And this was toward the beginning of 2010; am</p> <p>15 I right?</p> <p>16 A. I believe so.</p> <p>17 Q. Okay. But you're not sure exactly when the</p> <p>18 surgery took place?</p> <p>19 A. I've had my arm rebuilt four times, so it's a</p> <p>20 lot to keep track of.</p> <p>21 Q. Aside from this, you know, three- to</p> <p>22 four-month period in which you missed because of</p> <p>23 surgery, were there regular days in which you were not</p> <p>24 in the salon? And this is, again, in 2010.</p> <p>25 A. Again, I'm unclear why that would matter.</p>	<p>1 Q. (BY MR. JACOBSON) Other people that performed</p> <p>2 services --</p> <p>3 A. Wait a second. We need to get clear on</p> <p>4 something here. You keep saying working as part of my</p> <p>5 business. I had no one working as part of my business.</p> <p>6 I was the business Fingerprints. I had other people</p> <p>7 owning and operating and performing their own business</p> <p>8 inside of mine.</p> <p>9 So my business is my business. Everyone</p> <p>10 else's business was everyone else's business. But you</p> <p>11 keep trying to put it all together.</p> <p>12 Q. Well, we're going to get clear about that;</p> <p>13 okay?</p> <p>14 A. Okay.</p> <p>15 Q. Why don't you tell me who else was performing</p> <p>16 services at the salon in April of 2010.</p> <p>17 A. Let's see. I believe that I had four people</p> <p>18 leasing from me at that time. And I'm not sure what</p> <p>19 relevance it is to have anyone other than -- what we're</p> <p>20 really talking about today is Linda Cook.</p> <p>21 Q. That's okay. We're not here to decide what's</p> <p>22 relevant or not relevant.</p> <p>23 A. Right.</p> <p>24 Q. We're just here to listen to the questions I</p> <p>25 ask, and answer those questions. And I think your</p>
Page 19	Page 21
<p>1 Q. I appreciate your concern. It's just a matter</p> <p>2 of, if you don't know the answer to my question, then I</p> <p>3 need you to answer it.</p> <p>4 A. Could you please state it again.</p> <p>5 Q. Sure. In 2010, were there regular days that</p> <p>6 you were not in the salon?</p> <p>7 A. I've already answered that.</p> <p>8 Q. I don't believe you have.</p> <p>9 A. Okay. I can't tell you the exact days that I</p> <p>10 went to work and didn't go to work in 2010. There was a</p> <p>11 period of time I missed work because of a surgery. But</p> <p>12 I don't have the exact dates. I'm sorry.</p> <p>13 Q. You keep an appointment book for your clients;</p> <p>14 correct?</p> <p>15 A. Correct. But I did not bring my appointment</p> <p>16 book for 2010.</p> <p>17 Q. You have an appointment book for 2010; is that</p> <p>18 right?</p> <p>19 A. I'm not sure that I do.</p> <p>20 Q. Okay. If you do have an appointment book for</p> <p>21 2010, if you would provide that to your counsel so that</p> <p>22 he can produce that.</p> <p>23 Now, you had other individuals that were</p> <p>24 working as part of the business in April of 2010; right?</p> <p>25 MR. WRIGHT: Object --</p>	<p>1 attorney has informed you of that.</p> <p>2 A. Correct.</p> <p>3 Q. So I need you to do that; okay?</p> <p>4 A. This is what I remember, that Linda Cook</p> <p>5 leased a spot from me in 2010.</p> <p>6 Q. Who else leased spots from you in 2010?</p> <p>7 A. I had a massage therapist that was leasing a</p> <p>8 spot from me.</p> <p>9 Q. What was her name?</p> <p>10 A. It was a male.</p> <p>11 Q. Male.</p> <p>12 A. Jim. I can't remember Jim's last name.</p> <p>13 And I had a couple hairdressers leasing spots</p> <p>14 from me back then. And I don't really remember their</p> <p>15 names either.</p> <p>16 And my sister leased a spot from me.</p> <p>17 Q. Do you have any records of who these people</p> <p>18 were?</p> <p>19 A. No, I don't.</p> <p>20 Q. You didn't have any written lease agreements</p> <p>21 with them either, did you?</p> <p>22 A. Oh, absolutely.</p> <p>23 Q. Do you have those lease agreements now?</p> <p>24 A. No, I don't.</p> <p>25 Q. Do you know where they are?</p>

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<p>1 A. Yes, I do.</p> <p>2 Q. Where are they?</p> <p>3 A. In the trash. After I closed my salon, I was</p> <p>4 rejoicing like nobody's business, and anything that</p> <p>5 pertained to my business went straight into the trash,</p> <p>6 because I was done.</p> <p>7 In fact, I'm not even sure I have old</p> <p>8 appointment books.</p> <p>9 Q. You don't have written independent contractor</p> <p>10 agreements with these people either, do you?</p> <p>11 A. I had written contract agreements, lease</p> <p>12 agreements, for everyone that ever leased a spot from me</p> <p>13 at Fingerprints. But when I closed my business, as I</p> <p>14 previously just stated, I threw everything away because</p> <p>15 who knew that I would need it three years later.</p> <p>16 Q. You said you were particularly rejoicing about</p> <p>17 closing down the salon. Is there any reason why?</p> <p>18 A. Yes.</p> <p>19 Q. Why was that?</p> <p>20 A. Because I have been doing this for 25 years,</p> <p>21 and I was hurt in a car accident, and I needed to just</p> <p>22 rest and be quiet. I've spent over two years in a chair</p> <p>23 from a car accident.</p> <p>24 Q. Besides the equipment that you described</p> <p>25 earlier, that you owned in relation to the salon, did</p>	<p>1 Q. Did you ever have any requirements of them as</p> <p>2 to when they needed to be at the salon?</p> <p>3 A. Absolutely not.</p> <p>4 Q. They could come and go as they chose?</p> <p>5 A. Yes.</p> <p>6 Q. They could set appointments as they wanted to?</p> <p>7 A. Yes.</p> <p>8 Q. What about lunch; were you ever concerned or</p> <p>9 upset when they would take a lunch?</p> <p>10 A. None of my business.</p> <p>11 Q. Did you ever provide any type of promotional</p> <p>12 offer or coupon-type offer in relation to the salon?</p> <p>13 MR. WRIGHT: Object to the form.</p> <p>14 THE WITNESS: Me personally?</p> <p>15 Q. (BY MR. JACOBSON) You or in relation to</p> <p>16 Fingerprints, generally.</p> <p>17 A. No. My clients -- I've had a full clientele</p> <p>18 for years.</p> <p>19 Q. Did you ever run a coupon book --</p> <p>20 A. Me personally?</p> <p>21 Q. -- offer? Yes.</p> <p>22 A. No.</p> <p>23 COURT REPORTER: If you would please wait for</p> <p>24 him to finish the question, that would be great.</p> <p>25 Q. (BY MR. JACOBSON) Why did you distinguish you</p>
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<p>1 you also provide tools and materials for . . .</p> <p>2 A. Absolutely not.</p> <p>3 Q. Who provided those?</p> <p>4 A. The "leasers."</p> <p>5 MR. WRIGHT: Just to be clear, I think you</p> <p>6 mean the "lessees."</p> <p>7 THE WITNESS: Lessees, yes, that's true.</p> <p>8 Sorry.</p> <p>9 Q. (BY MR. JACOBSON) As far as you, just the</p> <p>10 work that you did at the salon in 2010, what types of</p> <p>11 manicure and pedicure instruments would you use? Would</p> <p>12 they be wooden, or would they be metallic?</p> <p>13 A. I personally used metal, because it was easier</p> <p>14 to sanitize. What the other girls used, I can't tell</p> <p>15 you. It was up to them to decide what they used.</p> <p>16 Q. Did you ever observe what they used?</p> <p>17 A. I really did not.</p> <p>18 Q. So you couldn't say one way or the other as</p> <p>19 far as wooden or metallic for the other --</p> <p>20 A. Everyone --</p> <p>21 Q. -- technicians?</p> <p>22 A. -- used different stuff. You know, it was</p> <p>23 their personal decision to decide what they wanted to</p> <p>24 use in their business. Just like it's my personal</p> <p>25 decision to decide what I use in my business.</p>	<p>1 personally, no? Were there others that you were aware</p> <p>2 of that were offering coupon offers in relation to</p> <p>3 Fingerprints?</p> <p>4 A. Oh, yes. The girls would get together. You</p> <p>5 know, the new people that came in, signed leases, that</p> <p>6 were trying to get clientele, they would often get</p> <p>7 together as a group and run promotional ads.</p> <p>8 But me personally, I've had a full clientele</p> <p>9 for years, and I have had no need to do that.</p> <p>10 Q. So you never ran any coupon offer in relation</p> <p>11 to Fingerprints Day Spa and then required the other</p> <p>12 technicians to honor those coupons?</p> <p>13 A. No.</p> <p>14 Q. Did you get any additional money or percentage</p> <p>15 of service fees for work that the other technicians did?</p> <p>16 A. No.</p> <p>17 Q. You never got a piece of their service</p> <p>18 payment?</p> <p>19 A. I wished. No, I did not.</p> <p>20 Q. Were there ever any requirements as to the</p> <p>21 volume of customers that they needed to service?</p> <p>22 A. No.</p> <p>23 Q. Did you use gloves when you provided services</p> <p>24 at Fingerprints? And, again, this is back in 2010.</p> <p>25 A. No.</p>

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<p>1 Q. Did you observe any of the other technicians 2 that were there using gloves when they provided 3 services? 4 A. I don't recall. 5 Q. I want to ask you again about these foot 6 basins that you were describing in relation to the 7 pedicure stations. Was there any standard or 8 requirement with respect to the temperature of the water 9 that was in those basins? 10 MR. WRIGHT: Object to the form. 11 Q. (BY MR. JACOBSON) Did you place any 12 requirement as to what the temperature of the water 13 needed to be in those foot basins when pedicure services 14 were being performed using them? 15 A. No. 16 Q. Are you aware of any other standard that was 17 used at the salon in terms of the temperature of the 18 water in those foot basins? 19 A. No. 20 Q. Did anyone ever measure the temperature of the 21 water in the foot basins when they used them to perform 22 pedicure services? 23 MR. WRIGHT: Objection; foundation. 24 THE WITNESS: I don't know, you know. 25 Q. (BY MR. JACOBSON) Did you ever perform</p>	<p>1 are using in the foot basins. 2 Now, for myself, of course I know what the 3 water temperature is. I know that they've been 4 sanitized. I know that I am working on somebody that 5 has a medical condition. And I am aware of all of that. 6 What the other girls do when they do their 7 services, I have no idea what they do. It is none of my 8 business. What my business is, is when I work on my 9 clients only. 10 Q. When would you take the temperature of the 11 water when you serviced your clients? 12 A. Well, I would put my hand in it, and if it was 13 too hot for my hand, it was probably too hot for their 14 feet. 15 Q. What other procedures or protocols did you 16 undergo or perform with respect to people who had cuts 17 or sores on their feet? 18 A. I just answered that. 19 Q. Nothing else beyond what you just said? 20 A. Well, there's really not much more that I can 21 do, other than to make sure that everything I'm using is 22 cleaned, sanitized, even above industry standards, 23 especially for special needs clients such as diabetics. 24 Q. You were responsible for the cleaning and 25 sanitation of the equipment at the salon back in 2010;</p>
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<p>1 services using these pedicure foot basins? And this is, 2 again, back in 2010. 3 A. Yes. 4 Q. Did you ever take the temperature of the water 5 that you used in these foot basins? 6 A. No. 7 Q. Did you have any procedure or standard with 8 respect to providing services, using these foot basins, 9 for people who had cuts or sores on their feet? 10 A. Again, I'm unclear about your line of 11 questioning. In regards to my own clientele, yes. I do 12 a lot of people that are diabetic, that have special 13 needs; they're elderly. And I've always been very 14 cognizant of the temperature of the water, the 15 sanitation, my implements, because I do work on people 16 that have special needs. 17 And, yes, I have always taken every precaution 18 to make sure that my clients have the appropriate 19 temperature in their water, the appropriate sanitation. 20 And I go above and beyond just to make sure those 21 clients remain safe when I am working on my clients. 22 Q. Now, just so that I understand, you testified 23 just previously that you never took the temperature of 24 the water that you used in the foot basins. 25 A. That was the temperature of what other people</p>	<p>1 is that right? 2 MR. WRIGHT: Object to the form. Misstates 3 prior testimony. 4 Q. (BY MR. JACOBSON) Go ahead and answer if you 5 can. 6 A. I am responsible for when I use the pedicure 7 stations or any other thing in the salon, that I don't 8 rely on the last person, who should have cleaned and 9 sanitized it. I take my own initiative and sanitize it 10 again before my personal clients. 11 Q. And you took no other efforts to sanitize any 12 other tools or equipment at the salon other than the 13 ones that you used; is that right? 14 A. That is correct. 15 Q. What was your procedure or protocol for 16 cleaning and sanitizing the equipment that you used at 17 the salon back in 2010? 18 A. Well, I would clean the pedicure chair, 19 whether it looked clean or not. And I would run some 20 Let's Touch through the jets. And all my implements 21 were always soaked in Barbicide or put in the autoclave 22 before and after every client. 23 Q. So you went through that cleaning routine 24 before and after -- 25 A. Correct.</p>

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<p>1 Q. -- every client?</p> <p>2 A. That pertains to me and my personal clients</p> <p>3 only.</p> <p>4 Q. When you say "before and after," does that</p> <p>5 mean that, for each client that you serviced, there were</p> <p>6 two of these cleansing routines that you went through?</p> <p>7 A. No. I would only do the sanitizer before the</p> <p>8 jets, and the jets before my clients. But the tub is</p> <p>9 cleaned, you know, before and after every time.</p> <p>10 We have the cleanest pedicure stations in</p> <p>11 town.</p> <p>12 Q. How do you know that?</p> <p>13 A. Well, because I've been inspected. I've been</p> <p>14 in this business for a long time. With regards to the</p> <p>15 Bureau of Occupational Licenses, every time the salon</p> <p>16 had ever been inspected, we've only gotten grade A's.</p> <p>17 Everyone that leased from me, their individual</p> <p>18 stations got inspected for sanitizing and all that, and</p> <p>19 they always got A's. Anyone that's ever leased from me,</p> <p>20 or my business, personally has never gotten anything</p> <p>21 below a grade A.</p> <p>22 Q. Do you have any of these inspection report</p> <p>23 results?</p> <p>24 A. Again, I don't, but they're on file at the</p> <p>25 Bureau of Occupational Licenses.</p>	<p>1 So the inspector goes to each person and says,</p> <p>2 "What sanitizers are you using? Can we see your</p> <p>3 implements? What are you using to sanitize the pedicure</p> <p>4 chairs when you use them?"</p> <p>5 So the State comes in and regulates these</p> <p>6 girls. I don't have to.</p> <p>7 Q. Do you have any receipts as far as your</p> <p>8 purchase of sanitizing materials, such as the Barbicide</p> <p>9 that you mentioned, but any other sanitizing materials</p> <p>10 that you purchased in 2010?</p> <p>11 A. Probably not.</p> <p>12 May I say something? And I just --</p> <p>13 Q. Do you want to --</p> <p>14 A. I would like to say something. Again, I'm</p> <p>15 unclear what my receipts for my sanitizing for my</p> <p>16 clients, what relevance that would have on this case</p> <p>17 today. I'm confused as to that.</p> <p>18 Q. Ms. Peabody, this is a discovery deposition.</p> <p>19 A. Oh, okay.</p> <p>20 Q. And during the course of a discovery</p> <p>21 deposition, there is the opportunity for me to ask,</p> <p>22 normally, questions that have relevance, but that are</p> <p>23 reasonably calculated to lead to the discovery of</p> <p>24 admissible evidence.</p> <p>25 A. Okay.</p>
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<p>1 Q. Were you aware of any manufacturer</p> <p>2 requirements with respect to cleaning or sanitizing</p> <p>3 these foot basins?</p> <p>4 A. No.</p> <p>5 Q. And, again, it's your testimony that you don't</p> <p>6 have any idea what the other technicians did with</p> <p>7 respect to cleansing or sanitizing equipment or these</p> <p>8 stations?</p> <p>9 A. No. I basically relied on the Bureau of</p> <p>10 Occupational Licenses to do their job and inspect each</p> <p>11 business owner and give their inspection results.</p> <p>12 Everyone had their own inspection results at</p> <p>13 their stations. They had their license at their</p> <p>14 stations. The State came in and inspected everyone</p> <p>15 yearly, sometimes twice a year.</p> <p>16 So I relied on the State to do their job and</p> <p>17 say, yes, everyone that is working, leasing under you,</p> <p>18 under their own business, has met the State requirement.</p> <p>19 Q. Do you know how many State inspections</p> <p>20 occurred at your facility in 2010?</p> <p>21 A. I think two. About every six months.</p> <p>22 Q. And . . .</p> <p>23 A. And each person, just so you're clear, the</p> <p>24 lessors -- the lessees, are required by the State to</p> <p>25 have their own sanitation, their own everything.</p>	<p>1 Q. That casts a very broad net in terms of what I</p> <p>2 get to inquire into during the course of this</p> <p>3 deposition.</p> <p>4 A. Okay.</p> <p>5 Q. And, again, your testimony is that you have no</p> <p>6 knowledge as to what the other technicians were doing by</p> <p>7 way of cleaning routines, or disinfectant materials, or</p> <p>8 anything related to the sanitation of equipment or tools</p> <p>9 at the salon in 2010?</p> <p>10 MR. WRIGHT: Objection. Misstates her prior</p> <p>11 testimony.</p> <p>12 Q. (BY MR. JACOBSON) Go ahead and answer if you</p> <p>13 can, or clarify where you feel you need to.</p> <p>14 A. Well, again -- I'll repeat myself. Again, I</p> <p>15 rely on the State, the Bureau of Occupational Licenses,</p> <p>16 to come in and do their inspections on everyone that had</p> <p>17 their own individual license, working at the salon, to</p> <p>18 do their job. That is their job, not my job.</p> <p>19 Q. Did the State Bureau of Licenses give you any</p> <p>20 advanced notice as to when they would arrive for their</p> <p>21 inspections, or were they on a particular schedule?</p> <p>22 A. Never. It was all random.</p> <p>23 Q. Do you know who Tracy Sales is?</p> <p>24 A. I'm assuming it's this lady right here.</p> <p>25 Q. Have you ever had any interactions with Tracy</p>

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<p>1 Sales prior to today?</p> <p>2 A. No.</p> <p>3 Q. Have you ever spoken with Tracy Sales in the</p> <p>4 past?</p> <p>5 A. Not that I can remember.</p> <p>6 Q. Are you aware of any statements that Tracy</p> <p>7 Sales may have made in relation to Fingerprints Day Spa</p> <p>8 or to the subject matter of this lawsuit?</p> <p>9 A. No.</p> <p>10 Q. Have you ever had a conversation with Linda</p> <p>11 Cook regarding this lawsuit?</p> <p>12 A. Yes.</p> <p>13 Q. When did this conversation occur?</p> <p>14 A. Probably after you called me.</p> <p>15 Q. Would that have been in the spring of 2012?</p> <p>16 A. That would have been then, because I had no</p> <p>17 prior knowledge.</p> <p>18 Q. And what did you and Ms. Cook discuss when you</p> <p>19 called her?</p> <p>20 A. Well, me and Ms. Cook discussed that she had a</p> <p>21 problem.</p> <p>22 Q. And what was her problem?</p> <p>23 A. That somebody she didn't buy Nu Skin from is</p> <p>24 suing her.</p> <p>25 Q. Why did you say that to her?</p>	<p>1 Q. (BY MR. JACOBSON) Go ahead and answer if you</p> <p>2 can.</p> <p>3 A. Rephrase, please.</p> <p>4 Q. Do you have any other basis or reason for</p> <p>5 believing that this lawsuit is frivolous beyond the</p> <p>6 period in which it was brought?</p> <p>7 MR. WRIGHT: Object to the form. Calls for a</p> <p>8 legal conclusion.</p> <p>9 Q. (BY MR. JACOBSON) Go ahead and answer, if you</p> <p>10 can.</p> <p>11 A. I'm still not really understanding the</p> <p>12 question.</p> <p>13 Q. Any other reason why you think this lawsuit is</p> <p>14 frivolous besides what you said?</p> <p>15 MR. WRIGHT: I'll renew the objection.</p> <p>16 You can answer if you understand the question.</p> <p>17 THE WITNESS: No.</p> <p>18 Q. (BY MR. JACOBSON) During this conversation</p> <p>19 that you and Ms. Cook had in the spring of 2012, what</p> <p>20 else did you talk about besides Ms. Cook's problem?</p> <p>21 A. Well, the fact that Ms. Sales could have, at</p> <p>22 any time, again, talked to Linda, when she had talked to</p> <p>23 her several times after the alleged incident; which, I'm</p> <p>24 not sure what really happened there; that Ms. Sales</p> <p>25 could have gone to any number of salons, and not</p>
Page 35	Page 37
<p>1 A. Because Linda and I had discussed that her and</p> <p>2 Ms. Sales had had somewhat of a relationship, that she</p> <p>3 had come to Linda several times and that Ms. Sales had</p> <p>4 tried to sell her some Nu Skin products. She declined.</p> <p>5 And that they had several conversations and</p> <p>6 opportunities for Ms. Sales to say that she was having</p> <p>7 problems with her pedicure, or her foot, and she never</p> <p>8 did.</p> <p>9 Q. Are you aware of Ms. Sales' medical treatment</p> <p>10 in any way?</p> <p>11 A. No.</p> <p>12 Q. Any other reason why you said that Linda Cook</p> <p>13 had a problem because she didn't buy Nu Skin from</p> <p>14 Ms. Sales?</p> <p>15 A. Well, I thought it was kind of a frivolous</p> <p>16 suit, given that it had been two years and Ms. Sales had</p> <p>17 never said to Linda that, "Hey, I'm having some</p> <p>18 problems. Could you look at it? Do you have anything?"</p> <p>19 I just thought it was rather weird that, two</p> <p>20 years later, that this would come up, when there was</p> <p>21 plenty of opportunity to discuss the matter before now.</p> <p>22 Q. Do you have any other reason to believe that</p> <p>23 the lawsuit is frivolous beyond the time frame in which</p> <p>24 it was brought?</p> <p>25 MR. WRIGHT: Object to the form.</p>	<p>1 disclosed that, and gotten pedicures somewhere else; she</p> <p>2 could have gone to the gym; she could have picked at her</p> <p>3 own toenail.</p> <p>4 And, in fact, that she's probably just trying</p> <p>5 to blame it on somebody else; that there was plenty of</p> <p>6 opportunity, for the condition that Ms. Sales has, to</p> <p>7 have gotten anywhere.</p> <p>8 Q. And these were statements that you made to</p> <p>9 Linda Cook?</p> <p>10 A. Oh, no. We discussed it back and forth. I</p> <p>11 mean, it's just like, really? After two years?</p> <p>12 Q. What did Linda Cook say to you in regard to,</p> <p>13 well, this could have happened somewhere else?</p> <p>14 A. Well, Ms. Cook is under the opinion that I</p> <p>15 have, that this could have been taken care of far sooner</p> <p>16 than it was; that if Ms. Sales had gone, seen a doctor,</p> <p>17 opened her mouth to Ms. Cook and said, "You know, I'm</p> <p>18 having some problems. Would you like to take a look at</p> <p>19 it?" Instead of just, you know, trying to sell her</p> <p>20 Nu Skin after the pedicure.</p> <p>21 Q. Were you aware of any of Ms. Sales' other</p> <p>22 activities, such as going to gyms or other pedicure or</p> <p>23 manicure places?</p> <p>24 A. No; that's just an assumption. Those are many</p> <p>25 of the places that somebody could get any kind of foot</p>

<p style="text-align: right;">Page 38</p> <p>1 infection or toe infection, you know. I mean, I'm sure</p> <p>2 Ms. Sales didn't only come to my salon in the period of</p> <p>3 two years, and she's never done anything else to --</p> <p>4 Q. That's just speculation on your part, isn't</p> <p>5 it?</p> <p>6 A. Absolutely, speculation.</p> <p>7 Q. Any other statements that you made to Ms. Cook</p> <p>8 or that she made to you during this phone conversation</p> <p>9 in the spring of 2012?</p> <p>10 A. No; other than that we just assumed that</p> <p>11 Ms. Sales probably got it somewhere else and was just</p> <p>12 looking for someone to blame.</p> <p>13 Q. Have you had any conversations with Ms. Cook</p> <p>14 since that telephone call in the spring of 2012?</p> <p>15 A. Yes.</p> <p>16 Q. When?</p> <p>17 A. Oh, I'm not sure.</p> <p>18 Q. Approximately when?</p> <p>19 A. Oh, I don't know; three weeks ago she called</p> <p>20 to see if I could give her the name of an</p> <p>21 air-conditioning guy that worked on our furnace -- that</p> <p>22 worked on my furnace at Fingerprints, and I gave her the</p> <p>23 name of somebody that could work on her furnace.</p> <p>24 Q. Besides this conversation three weeks ago,</p> <p>25 have you had any other communications with Ms. Cook</p>	<p style="text-align: right;">Page 40</p> <p>1 clients would call her, that we would always be able to</p> <p>2 take care of it in a responsible manner; saying, "Well,</p> <p>3 you know, you may need to see a doctor," or, "Here, come</p> <p>4 back in and let me see what I can do," or whatever. You</p> <p>5 know. Usually there's an easier, softer way.</p> <p>6 Q. So if a client had a problem after being</p> <p>7 serviced by you, you would want to observe and evaluate</p> <p>8 it to determine whether they needed additional medical</p> <p>9 attention?</p> <p>10 MR. WRIGHT: Object to the form.</p> <p>11 THE WITNESS: Well, I think you're taking this</p> <p>12 the wrong way. I mean, Ms. Sales --</p> <p>13 Q. (BY MR. JACOBSON) Ms. Peabody, I'm just</p> <p>14 trying to understand your response.</p> <p>15 A. What I'm saying is, if a client has a problem,</p> <p>16 usually -- I don't know what kind of relationship</p> <p>17 Ms. Sales and Linda had, but I know what kind of</p> <p>18 relationship I have with my clients.</p> <p>19 And I know that -- like I've had clients that</p> <p>20 have had pedicures, and they say to me, "Well, I've got</p> <p>21 an ingrown toenail. Would you look at it?" And I say,</p> <p>22 "Sure."</p> <p>23 You know, if there's a problem or whatever,</p> <p>24 usually the client relationship, once you've serviced</p> <p>25 somebody more than once, it's -- you care about that</p>
<p style="text-align: right;">Page 39</p> <p>1 about this lawsuit?</p> <p>2 A. No.</p> <p>3 Q. Are you aware of any other statements that</p> <p>4 Ms. Cook has made in relation to this lawsuit or the</p> <p>5 incident that's involved in it?</p> <p>6 A. Not other than I've already stated.</p> <p>7 Q. Who else have you spoken with about this</p> <p>8 lawsuit besides your attorney?</p> <p>9 A. My sister.</p> <p>10 Q. What is your sister's name?</p> <p>11 A. Debbie Hatch.</p> <p>12 Q. And what have you and Debbie discussed</p> <p>13 regarding this lawsuit?</p> <p>14 A. Probably the frivolity of it.</p> <p>15 Q. Do you mean the frivolous nature of it?</p> <p>16 A. Correct.</p> <p>17 Q. And what have you discussed in relation to the</p> <p>18 frivolous nature of this lawsuit?</p> <p>19 A. Well, just the fact that it's been two years.</p> <p>20 And my sister has also been in the business a long time,</p> <p>21 20 years, and she has never had any clients at any time</p> <p>22 have any problems. I've never had any clients at any</p> <p>23 time have any problems.</p> <p>24 And that, you know, usually if a client does</p> <p>25 have a problem, they would call me, or if my sister's</p>	<p style="text-align: right;">Page 41</p> <p>1 person, and you want to make sure they're okay and that</p> <p>2 your service is okay.</p> <p>3 And if someone is communicating to you, you</p> <p>4 can say, "Well, here, let me take a look at it."</p> <p>5 You know, I've sent my clients to doctors for</p> <p>6 skin cancers that I've seen on their feet and their</p> <p>7 legs. Or I've recognized circulation problems in their</p> <p>8 feet, and I've said, you know, "I think you need to go</p> <p>9 see a doctor. This doesn't look right to me. It's not</p> <p>10 normal." You know, things like that.</p> <p>11 Like, I was actually surprised that, given the</p> <p>12 couple times -- I don't know. Linda kind of said her</p> <p>13 and Ms. Sales had a relationship. So I was surprised</p> <p>14 that Ms. Sales didn't say anything about her problem, as</p> <p>15 her and Linda's relationship grew about her problem,</p> <p>16 until a lawsuit. She had plenty of opportunities in</p> <p>17 regards with Ms. Cook to say something to her.</p> <p>18 Q. Do you feel that it's your responsibility,</p> <p>19 when you're servicing clients, that you have to</p> <p>20 determine when they may or may not need to seek medical</p> <p>21 treatment?</p> <p>22 MR. WRIGHT: I'm going to object to the form.</p> <p>23 THE WITNESS: No, it is not my responsibility.</p> <p>24 Q. (BY MR. JACOBSON) Is that something that is</p> <p>25 part of the State licensure for nail technicians?</p>

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<p>1 A. No, it is not.</p> <p>2 Q. Is that an expectation that you would have</p> <p>3 with respect to the other nail technicians that were</p> <p>4 working at Fingerprints Day Spa back in 2010?</p> <p>5 MR. WRIGHT: Object to the form.</p> <p>6 THE WITNESS: No, it is not. I do that with</p> <p>7 my personal clients, because I care.</p> <p>8 Now, what the other girls do with their</p> <p>9 clients is their decision.</p> <p>10 Q. (BY MR. JACOBSON) Anything else you and your</p> <p>11 sister Debbie have spoken about in relation to this</p> <p>12 lawsuit?</p> <p>13 A. Again, you know, women that work, doing the</p> <p>14 same kind of work, everyone owns their own business,</p> <p>15 does their same kind of clients; we're all just taken</p> <p>16 back a little bit by the fact that Ms. Sales waited this</p> <p>17 long and didn't, you know, say anything to anybody about</p> <p>18 her problem, and then all of a sudden decides to pin it</p> <p>19 on Linda.</p> <p>20 Q. Who are these other people that you're</p> <p>21 referring to?</p> <p>22 A. Well, basically me, Linda, and, you know, of</p> <p>23 course I've discussed it with my sister. I mean, I</p> <p>24 asked her, "In 25 years, have you ever had a client that</p> <p>25 has had any problems?" "No."</p>	<p>1 involving Ms. Sales?</p> <p>2 A. I have absolutely done nothing wrong.</p> <p>3 Q. Besides the cleaning procedure that you</p> <p>4 described that you went through with respect to your</p> <p>5 clients, where you would clean the station before</p> <p>6 servicing the client and after servicing the client, did</p> <p>7 you do any other cleansing or sanitizing activities?</p> <p>8 A. In regards to my own personal stuff?</p> <p>9 Q. Yes.</p> <p>10 A. Oh, absolutely, yes.</p> <p>11 Q. What else would you do?</p> <p>12 A. Well, we keep all of our -- well, I keep all</p> <p>13 of my implements, and, actually, all of the girls kept</p> <p>14 all of their stuff in sanitation stuff. I mean --</p> <p>15 because it's required by the State law.</p> <p>16 So everyone that worked in that building that</p> <p>17 had their own business, everyone basically observed the</p> <p>18 same sanitation. We would all clean our implements in</p> <p>19 sanitizing containers, including myself. Because if we</p> <p>20 get inspected, we could lose our licenses.</p> <p>21 Everyone is individually licensed. If the</p> <p>22 State board comes in and you're not in compliance with</p> <p>23 the sanitation, you could lose your license. And, you</p> <p>24 know, we don't know when we're going to be inspected.</p> <p>25 Q. Would everyone in the facility lose their</p>
Page 43	Page 45
<p>1 Have I ever had a client that's had any other</p> <p>2 problems? No.</p> <p>3 "Linda, have you had a client that's ever had</p> <p>4 any other problems?" "No."</p> <p>5 Q. Anyone else that you've spoken to about this</p> <p>6 lawsuit that you haven't named for me yet?</p> <p>7 A. No.</p> <p>8 Q. Anyone else that you've spoken with about the</p> <p>9 incident involving Ms. Sales back in April of 2010?</p> <p>10 A. No.</p> <p>11 Q. And I just want to be clear in terms of your</p> <p>12 testimony. Is it your testimony that, with regard to</p> <p>13 the other technicians that were performing services at</p> <p>14 Fingerprints Day Spa back in 2010, that you had no</p> <p>15 control or oversight or responsibility for their</p> <p>16 activities in servicing clients?</p> <p>17 A. I had zero control.</p> <p>18 Q. And, again, is it your testimony that you took</p> <p>19 no other efforts and you had no other responsibility for</p> <p>20 cleaning equipment, tools, including the foot basins, on</p> <p>21 any station except the ones that you personally serviced</p> <p>22 clients at?</p> <p>23 A. That's correct.</p> <p>24 Q. And is it your testimony that you believe that</p> <p>25 you have done nothing wrong in relation to the incident</p>	<p>1 license?</p> <p>2 A. No, just the individual. It's an individual</p> <p>3 thing, you know. So everyone kept their stuff sanitized</p> <p>4 and in sanitizers, because, again, the inspector would</p> <p>5 come in and inspect every individually licensed person.</p> <p>6 Q. What type of sanitizing solution would you</p> <p>7 keep your tools in?</p> <p>8 A. It's called Let's Touch or Barbicide. Those</p> <p>9 are the industry standards.</p> <p>10 Q. And did the other technicians also keep their</p> <p>11 tools in the same sanitizing solution?</p> <p>12 MR. WRIGHT: Objection; foundation.</p> <p>13 THE WITNESS: I can answer it.</p> <p>14 I'm assuming so, because the Bureau of</p> <p>15 Occupational Licenses gave them a grade A sanitation.</p> <p>16 So they were inspected; they got their</p> <p>17 grade A; so I'm assuming they did. Unless, of course,</p> <p>18 the, you know, Bureau of Occupational Licenses wasn't</p> <p>19 doing their job.</p> <p>20 Q. (BY MR. JACOBSON) What other sanitation</p> <p>21 activities would you go through besides keeping your</p> <p>22 tools in the sanitation solution that you described?</p> <p>23 A. Really there's no other. I mean, that's it.</p> <p>24 You sanitize your implements; you clean your stuff, you</p> <p>25 know, before you use it; and that's what you do.</p>

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<p>1 Q. What about with regard to the other 2 technicians; what did you observe them do by way of 3 cleaning or sanitizing activities?</p> <p>4 MR. WRIGHT: Objection; asked and answered. 5 THE WITNESS: It's already been answered. 6 Q. (BY MR. JACOBSON) You can go ahead and answer 7 again. 8 A. Well, to be honest with you, I really pretty 9 much focused on my clients and what I was doing. The 10 other girls, they had their own thing going on. It was 11 their business. It was none of mine. 12 Q. And the only reason that I ask, Ms. Peabody, 13 is that you had just testified that you observed that 14 they kept their tools in a sanitizing solution that was 15 the same thing that you were keeping yours in. 16 A. Well, what I observed is that they had their 17 license and that they had their inspection at their 18 thing, at their stations. That's what I observed. 19 So if they had their license and their 20 inspection that says "A," they had their stuff in State 21 -- they had their stuff in whatever the State requires 22 them to have their sanitizing stuff in. And I can't 23 tell you if they used the same stuff I did, but I'm 24 assuming, again, that the Bureau of Occupational 25 Licenses did their job when they inspected these gals.</p>	<p>1 Q. And did you obtain any college or secondary 2 education beyond high school? 3 A. Yes. 4 Q. What did you receive by way of secondary 5 education? 6 A. I went to nail school and got my license. 7 Q. And so when were you first licensed as a nail 8 technician in Idaho? 9 A. When I was 20 years old. 10 Q. And since that time to the present -- and you 11 can correct me if I'm wrong -- 12 A. Okay. 13 Q. Since that time to the present, is that the 14 same period approximately that you had Fingerprints Day 15 Spa? 16 A. Oh, no. I worked for a couple other salons 17 before I opened my own company. 18 Q. Are any of those salons that you worked for 19 still in business that you know? 20 A. I don't know. 21 Q. Do you recall the names of these other salons 22 that you've worked for? 23 A. Uh-huh (nodding head). 24 Q. What are they? 25 A. Let's see. Looks Unlimited. The Place To Be.</p>
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<p>1 Q. And I believe you said that the Bureau of 2 Occupational Licenses made their inspections no more 3 than twice a year? 4 A. Correct. 5 Q. Ms. Peabody, did you grow up in the Treasure 6 Valley? 7 A. No. 8 Q. Where were you born? 9 A. Idaho Falls. 10 Q. And how long did you live in Idaho Falls? 11 A. Probably until I was, like, five or six. 12 Q. And then where did you move after that? 13 A. California. 14 Q. And how long did you live in California? 15 A. About four years. 16 Q. Did you move around frequently growing up? 17 A. Yes. My father was in the military. 18 Q. I'm not going to ask you to go through that 19 catalog, then. 20 A. Well, I certainly can. 21 Q. Where did you graduate from high school at? 22 A. Boise High. 23 Q. So when did you move to Boise; do you remember 24 that? 25 A. In 1980.</p>	<p>1 Yeah, those are the two shops I worked for before I 2 opened my own company. 3 Q. Do you remember approximately the year that 4 you started Fingerprints Day Spa? 5 A. Let me see. I think 1987. 6 Q. Are you married? 7 A. Yes. 8 Q. And how long have you been married? 9 A. Ten years. 10 Q. And what is your husband's name? 11 A. Jim Baugh. 12 Q. And have you ever spoken with Jim about this 13 lawsuit? 14 A. No. 15 Q. The two of you have never talked about it? 16 A. We're separated right now. 17 Q. I see. How long have you been separated? 18 A. Two years. 19 Q. Do you have any children? 20 A. Yes. 21 Q. How many children do you have? 22 A. Two. My son Tanner is 21, and my daughter 23 Shyanne is 19. 24 Q. Have you ever talked to Tanner or Shyanne 25 about this lawsuit?</p>

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<p>1 A. No.</p> <p>2 Q. They're not interested?</p> <p>3 A. No. God no.</p> <p>4 MR. JACOBSON: I don't think that I have any</p> <p>5 other questions at this time.</p> <p>6 MR. WRIGHT: I don't have any questions.</p> <p>7 (Deposition concluded at 10:12 a.m.)</p> <p>8 (Signature requested.)</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>1 CHANGE SHEET FOR STACIE PEABODY</p> <p>2 Page ___ Line ___ Reason for Change _____</p> <p>Reads _____</p> <p>3 Should Read _____</p> <p>4 Page ___ Line ___ Reason for Change _____</p> <p>Reads _____</p> <p>5 Should Read _____</p> <p>6 Page ___ Line ___ Reason for Change _____</p> <p>Reads _____</p> <p>7 Should Read _____</p> <p>8 Page ___ Line ___ Reason for Change _____</p> <p>Reads _____</p> <p>9 Should Read _____</p> <p>10 Page ___ Line ___ Reason for Change _____</p> <p>Reads _____</p> <p>11 Should Read _____</p> <p>12 Page ___ Line ___ Reason for Change _____</p> <p>Reads _____</p> <p>13 Should Read _____</p> <p>14 Page ___ Line ___ Reason for Change _____</p> <p>Reads _____</p> <p>15 Should Read _____</p> <p>16 Page ___ Line ___ Reason for Change _____</p> <p>Reads _____</p> <p>17 Should Read _____</p> <p>18 Page ___ Line ___ Reason for Change _____</p> <p>Reads _____</p> <p>19 Should Read _____</p> <p>20 Page ___ Line ___ Reason for Change _____</p> <p>Reads _____</p> <p>21 Should Read _____</p> <p>22 Page ___ Line ___ Reason for Change _____</p> <p>Reads _____</p> <p>23 Should Read _____</p> <p>24 Please use a separate sheet if you need more room.</p> <p>25 WITNESS SIGNATURE _____</p>
<p style="text-align: right;">Page 51</p> <p>1 CERTIFICATE OF WITNESS</p> <p>2 I, STACIE PEABODY, being first duly sworn, depose</p> <p>3 and say:</p> <p>4 That I am the witness named in the foregoing</p> <p>5 deposition, consisting of pages 1 through 50; that I</p> <p>6 have read said deposition and know the contents thereof;</p> <p>7 that the questions contained therein were propounded to</p> <p>8 me; and that the answers contained therein are true and</p> <p>9 correct, except for any changes that I may have listed</p> <p>10 on the Change Sheet attached hereto.</p> <p>11 DATED this ___ day of ___, 2013.</p> <p>12</p> <p>13 _____</p> <p>14 STACIE PEABODY</p> <p>15 SUBSCRIBED AND SWORN to before me this ___ day of</p> <p>16 ___, 2013.</p> <p>17</p> <p>18 _____</p> <p>19 NAME OF NOTARY PUBLIC</p> <p>20</p> <p>21 NOTARY PUBLIC FOR _____</p> <p>22 RESIDING AT _____</p> <p>23 MY COMMISSION EXPIRES _____</p> <p>24</p> <p>25</p>	<p style="text-align: right;">Page 53</p> <p>1 REPORTER'S CERTIFICATE.</p> <p>2 I, EMILY L. NORD, CSR No. 695, Certified</p> <p>3 Shorthand Reporter, certify:</p> <p>4 That the foregoing proceedings were taken</p> <p>5 before me at the time and place therein set forth, at</p> <p>6 which time the witness was put under oath by me;</p> <p>7 That the testimony and all objections made</p> <p>8 were recorded stenographically by me and were thereafter</p> <p>9 transcribed by me, or under my direction;</p> <p>10 That the foregoing is a true and correct</p> <p>11 record of all testimony given, to the best of my</p> <p>12 ability.</p> <p>13 I further certify that I am not a relative or</p> <p>14 employee of any attorney or party, nor am I financially</p> <p>15 interested in the action.</p> <p>16 IN WITNESS WHEREOF, I set my hand and seal</p> <p>17 this 1st day of April, 2013.</p> <p>18</p> <p>19 </p> <p>20</p> <p>21 EMILY L. NORD, CSR, RPR</p> <p>22 Notary Public</p> <p>23 P.O. Box 2636</p> <p>24 Boise, Idaho 83701-2636</p> <p>25 My Commission expires November 5, 2017.</p>

TRACY SALES VOLUME I
SALES vs. PEABODY

January 29, 2013
1-4

Page 1	Page 3
<p>IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA</p> <p>TRACY SALES, individually,) Plaintiff,) vs.)</p> <p>STACIE PEABODY, individually and) Case No. CV PI 1206516 doing business under the assumed) VOLUME I name of FINGERPRINTS DAY SPA; and) LINDA COOK, individually,) Defendants.)</p> <p>DEPOSITION OF TRACY SALES JANUARY 29, 2013</p> <p>REPORTED BY: MONICA M. ARCHULETA, CSR NO. 471 NOTARY PUBLIC</p>	<p>1 APPEARANCES: 2 For the Defendant Cook: 3 BAUER & FRENCH 4 BY: MS. MARGALIT Z. RYAN 5 1501 Tyrell Lane 6 P.O. Box 2730 7 Boise, Idaho 83701</p> <p>8 9 ALSO PRESENT: Linda Cook 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>
Page 2	Page 4
<p>1 THE DEPOSITION OF TRACY SALES was taken on 2 behalf of the Defendants Stacie Peabody and Fingerprints 3 Day Spa at the offices of Carey Perkins, 300 North 6th 4 Street, Suite 200, Boise, Idaho, commencing at 9:45 a.m. 5 on January 29, 2013, before Monica M. Archuleta, 6 Certified Shorthand Reporter and Notary Public within 7 and for the State of Idaho, in the above-entitled 8 matter.</p> <p>9 10 APPEARANCES: 11 For the Plaintiff: 12 JACOBSON & JACOBSON, PLLC 13 BY: MR. JAMES F. JACOBSON 14 660 E. Franklin Road, Suite 110 15 Meridian, Idaho 83642</p> <p>16 17 For the Defendants Stacie Peabody and Fingerprints 18 Day Spa: 19 CAREY PERKINS, LLP 20 BY: MS. AMY ZAVIDOW 21 MR. TRACY L. WRIGHT 22 Capitol Park Plaza 23 300 North 6th Street, Suite 200 24 P.O. Box 519 25 Boise, Idaho 83701</p>	<p>1 INDEX 2 TESTIMONY OF TRACY SALES: 3 Examination by Ms. Zavidow 5 4 5 6 EXHIBITS 7 1. Notice of Taking Deposition Duces Tecum 7 8 2. David C. Nielsen, M.D., Summary View - 89 9 10/11/2010 10 3. Letter to David Nielsen, M.D. dated 100 11 December 14, 2010 from Thomas Coffman, M.D. 12 4. David C. Nielsen, M.D. - Patient Summary 107 13 5. Letter to John Ader, DO, dated November 30, 116 14 2011 from Casi M. Wyatt, DO 15 6. John T. Ader, DO Progress Notes dated 119 16 12/19/2011 17 18 19 20 21 22 23 24 25</p> <div data-bbox="1179 1727 1493 1908"><p>EXHIBIT</p><p>tabbies</p><p>B</p></div>

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1 broke into any particular level. I get three percent or
2 five percent of their sales. Not of their money. And I
3 get that from the company. They pay us in lieu of
4 paying advertisement.
5 Q. You get three percent to five percent of the
6 sales of people beneath you within your team?
7 A. It depends on their level. It depends on
8 where they are at. I get paid based on their circle
9 group volume on what they sell. But it depends on if
10 they are just a distributor or if they have broken to a
11 gold or above level. Then that reduces the amount of
12 money that I get paid. But I still get their volume.
13 It's complicated. But it's simple.
14 Q. You get the benefit of their volume in
15 addition -- even though they are on the same level or a
16 higher level than you are?
17 A. If they are higher than I am then I do not. I
18 get just a flat.
19 Q. How many levels are there?
20 A. Twelve, I guess. They come in groups of four,
21 so twelve all together. Four groups of four, basically.
22 Q. What level are you at?
23 A. I am just -- I still haven't even -- I've got
24 to requalify to become an executive. I'm just a
25 distributor right now.

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1 Q. How do you requalify?
2 A. By selling certain amount of volume. Or
3 buying a business pack. Which I can't afford to do.
4 Q. So you would qualify by selling volume or
5 buying a business pack?
6 A. Or by purchasing my own product. A certain
7 amount of volume. I don't have to buy a kit.
8 Q. You said that you have to requalify to be an
9 executor. When were you an executor?
10 A. Executive.
11 Q. Excuse me. Executive.
12 A. I have been a couple times over. A couple
13 months ago. I don't have the exact date. But then I
14 fell back out. So I'm redoing it for personal reasons.
15 Q. A couple of months ago you were an executive?
16 A. I believe it was November.
17 Q. Of 2012?
18 A. Yes.
19 Q. And then your sales dropped; is that correct?
20 A. That's correct. I stopped doing it for a
21 while.
22 Q. Why did you stop?
23 A. Personal reasons.
24 Q. When you say personal reasons, what reasons
25 are you referring to?

Page 83

1 A. They are personal and I would rather not go
2 into that. It has nothing to do with Nu Skin.
3 Q. If they are related to your psychological or
4 emotional well-being it is our position that that is
5 relevant to the matters in this case.
6 A. It's not. It is not related to that.
7 Q. If they are related to physical conditions or
8 symptoms it is also our position that it is relevant.
9 A. It is not.
10 Q. Is it correct that after the April 19, 2010
11 incident you went to the emergency room at St. Luke's to
12 be seen for chest pain and at that time you denied any
13 other acute concerns and had an unremarkable physical
14 exam? Do you remember that?
15 A. I don't know the date, but I went to the
16 emergency room. It was a Sunday. And I went in because
17 I thought I might have had a cracked rib. But because I
18 went into the emergency room they asked, "Are you having
19 chest pain?" And I said, "No, I'm having a pain here."
20 And they said they had to treat me as if I am having a
21 possible heart attack because of my age. And so that
22 process began. And then I was released.
23 Q. And you did not at that time mention anything
24 with your toe?
25 A. There was no reason to; no.

Page 84

1 Q. During the pedicure did you experience any
2 pain at any point?
3 A. I did not experience pain. There was one
4 point where there was -- well, yes, I did at one brief
5 point. Very quick.
6 Q. When was that?
7 A. When going around the cuticle it was sensitive
8 in one area. It didn't break open. It didn't bleed.
9 And it was not cuticle clippers. It was just pushing
10 back on the cuticle.
11 Q. Where on your toe was it sensitive?
12 A. On my right toe. Right at the nail bed.
13 Q. Had you ever felt that sensitivity before?
14 A. I have never had that happen; no.
15 Q. During your prior pedicures no pain?
16 A. No.
17 Q. Was there any blood?
18 A. No.
19 Q. Redness?
20 A. Well, after there was a little bit of redness.
21 But never any blood.
22 Q. Did the pain continue throughout the pedicure?
23 A. No. It was just like if you drop something on
24 your toe for a second. It was just real brief.
25 Q. After the pedicure did you go home?

EXPERT WITNESS REPORT OF DOUG SCHOON

I submit this written report which contains the following: (1) my qualifications, which are set forth in the attached curriculum vitae which is made a part of this report as though fully set forth herein, including a list of publications which I've authored within the preceding 10 years; (2) a statement of opinions to be expressed and the basis and reasons therefore; (3) the data or information which I considered in forming my opinions; (4) any exhibits to be used as a summary of or support for my opinions;

I. Qualifications

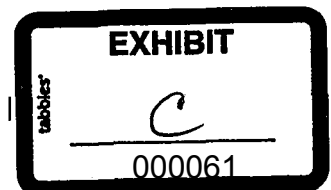
- A. M.S. Chemistry, University of California-Irvine, 1984.
- B. Twenty-five years' experience in the professional and retail nail salon industry.
- C. A leading scientific researcher, educator and internationally known author of four industry textbooks, as well as many chapters in dermatology and beauty industry reference books, dozens of educational articles, tapes, videos, DVD's, etc.
- D. Scientific expert specializing in the formulation of manicure, pedicure, natural and artificial nail products, salon services and procedures, product quality, labeling, warnings, regulations, proper handling and safe use.
- E. Scientific expertise in ingredients and materials used in products designed for natural, artificial nails, manicure and pedicure products.
- F. Scientific expertise in chemical testing and analysis of ingredients and materials used in products designed for natural, artificial nails, manicure and pedicure products.
- G. Scientific expert specializing in salon common/best practices, standards of care and client interactions.
- H. Serves as an industry liaison to NGO groups, associations and government organizations and specializes in US and Canadian cosmetic product regulations and ingredient issues.
- I. My attached CV lists additional relevant experience and qualifications.

II. List of References Used for Basis of Opinion

- A. Deposition of Tracy Sales, Vol. 1
- B. Deposition of Tracy Sales, Vol.2
- C. Deposition of Stacie Peabody
- D. Answers to Plaintiff's First Interrogatory, Stacie Peabody
- E. Plaintiff's Answers First Interrogatory, Tracy Sales
- F. Idaho Administrative Code, IDAPA 24.04.01, Rules of the Idaho Board of Cosmetology.
- G. Title 54, Professions, Vocations, and Businesses, chapter 8, 54-824. Establishments inspection Rules and chapter 5, 54-524. Inspections.
- H. Letter from Dr. Jeffrey Chandler, April 11, 2013
- I. Product label artwork for Let's Touch, Hospital and Salon Tuberculocidal Metal Disinfectant, Isabel Christina.
- J. State Board of Idaho, Bureau of Occupational Licenses, Idaho Board of Cosmetology, inspection reports.

May 9, 2013

1 |



IV. Opinion

Overview of Opinions

Opinion 1- Stacey Peabody did not properly clean and disinfect her pedicure tub unit. Improper cleaning and disinfection of such units is a leading cause of leg/foot related infections in nail establishments and her failure to do so significantly increase the potential for clients to develop directly related skin infections due to microbial cross-contamination.

Opinion 2- Stacey Peabody failed to properly follow label directions and by doing so misused an EPA registered disinfectant, Let's Touch, and created a potential infection risks for clients.

Opinion 3- An owner of a nail establishment, Stacey Peabody is responsible for providing safe conditions for workers, clients, visitors, etc. and she is incorrect to place this responsibility on the inspectors working for the Idaho Bureau of Occupational Licenses or the Board of Cosmetology.

Opinion 4- It is the responsibility of a nail establishment owner to assume the role of salon manager, unless the owner specifically assigns these tasks to another person under their management who is properly trained to perform these duties. It is not correct to claim these tasks are responsibility of the inspectors working for the Idaho Bureau of Occupational Licenses or the Board of Cosmetology.

Opinion 5- Stacey Peabody failed to make efforts to ensure those working in her establishment were doing so safely and properly; actions which can significantly increase the potential for transmission of infectious organisms, e.g. bacteria, fungi or viruses.

Opinions with Supporting Information

Opinion 1- Stacey Peabody did not properly clean and disinfect her pedicure tub unit. Improper cleaning and disinfection of such units is a leading cause of leg/foot related infections in nail establishments and her failure to do so significantly increase the potential for clients to develop directly related skin infections due to microbial cross-contamination.

- When asked to describe her procedures for cleaning and disinfecting her pedicure tub unit, Stacey Peabody claims, "*... I would run some Let's Touch through the jets.*" This is an improper use of an EPA registered product as well as, being ineffective as a disinfectant for this purpose and when used in this manner.
- Many pedicure related infection are caused by improper cleaning and disinfection of the pedicure tub units and in my experience units with pipes that direct water are the most often implicated in pedicure related infections.

Opinion 2- Stacey Peabody failed to properly follow label directions and by doing so misused an EPA registered disinfectant, Let's Touch, and created a potential infection risks for clients.

- Let's Touch is not designed or approved for use in the manner in which Stacey Peabody claimed to have used the product, nor would it have resulted in proper or effective disinfection of the pedicure tub units her nail establishment.
- Let's Touch products are of high quality and have high efficacy when used in accordance with the labeling instructions and all warnings are heeded, but that was not done by Stacey Peabody.
- The product labeling direction's for Let's Touch says, "*it is a violation of federal law to use this product in a manner inconsistent with its labeling.*" The remainder of the label provides instructions on how to disinfect "instruments". The products label does not recommend or provide usage instructions for any type of pedicure tubs and constitutes misuse for Stacey Peabody to use Let's Touch in the fashion she's claimed in her deposition. (Page 29)
- The product's labeling clearly states that the proper use for this product is with "*metal salon instruments including manicurist nippers and cuticle pushers, shears and metal skin care instruments*". Therefore it is a federal requirement that this disinfectant be used only on metal instruments and is effective only when diluted, used and stored as directed on the Let's Touch product label.
- Improper use of an EPA registered disinfectant reduces disinfection efficacy and may leave a surface covered with residual contamination that could later result in an infection and provides no assurance that clients are protected from microbial cross-contamination.

Opinion 3- An owner of a nail establishment, Stacey Peabody is responsible for providing safe conditions for workers, clients, visitors, etc. and she is incorrect to place this responsibility on the inspectors working for the Idaho Bureau of Occupational Licenses or the Board of Cosmetology.

- Federal OSHA CFR 29, 1910 requires business owners to ensure safe working conditions and under the Hazard Communication Standard they are required to provide warnings and effective training related to minimizing workplace exposure to potentially hazardous substances.
- Due to the too few inspectors, it would be highly unusual to for a state board inspector to visit a nail establishment several times per year, unless the salon had drawn attention due to previous violations of the rules and/or regulations. More typically, salon establishment inspections occur at 18 to 36 month intervals. Therefore, it is unreasonable to assume these rare inspections ensure those working in her nail establishment were working safely.

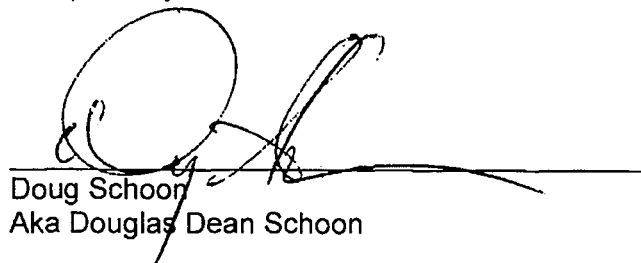
- Inspection reports from the State of Idaho Bureau of Occupational Licenses, Board of Cosmetology demonstrate that Stacey Peabody's nail establishment was suspected every two years, 2007, 2009, and 2011. In 2009 and 2011, points were deducted from her personal inspection score in relation to improper "Instrument Sanitizing".
- In 2011, Stacey Peabody's citation was for failing to properly change the disinfectant used to disinfect salon implements as required while in 2009 two points were again deducted and the reason cited was, *"needs hospital grade sanitizer for files and brushes"*.

Opinion 4- It is the responsibility of a nail establishment owner to assume the role of salon manager, unless the owner specifically assigns these tasks to another person under their management who is properly trained to perform these duties. It is not correct to claim these tasks are responsibility of the inspectors working for the Idaho Bureau of Occupational Licenses or the Board of Cosmetology.

- When asked what she knew about the other technicians cleaning and disinfection procedures, Stacie Peabody stated, *"No. I basically relied on the Bureau of Occupational Licenses to do their job and inspect each business owner and given their inspection results... So I relied on the state to do their job and say, yes, everyone that is working, leasing under you, under their own business, has met the state requirements... That's their job, that's not my job."* (Page 31) and she claims to have, *"I had zero control."* (Page 43).

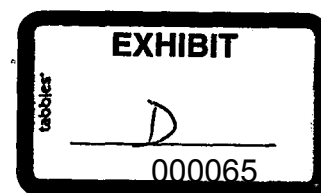
Opinion 5- Stacey Peabody failed to make efforts to ensure those working in her establishment were doing so safely and properly; actions which can significantly increase the potential for transmission of infectious organisms, e.g. bacteria, fungi or viruses.

Respectfully submitted,



Doug Schoon
Aka Douglas Dean Schoon

**INSPECTIONS OF FINGER PRINTS, CS-6091
2007 - PRESENT**



STATE OF IDAHO
DEPARTMENT OF SELF-GOVERNING AGENCIES
BUREAU OF OCCUPATIONAL LICENSES
IDAHO BOARD OF COSMETOLOGY

CS-6091

Inspection No. 20070724

CS-6091	3/11/1998
FINGER PRINTS	
STACIE PEABODY	
1414 BROADWAY	
BOISE, ID, 83706	

Inspection Date:	7/18/2007	Shop Phone No:	208 384-9908
Final Score:	100	Investigator:	Kevin Malveaux
Comments:			
Notes:	lgoff - 09/01/2011: OOB STACIE PEABODY Confirmed by NEW NEW SALON IN HOME		

Item	Item	Detail Notes	Weight	Points Off
1	Premises			
	a. Shall be open to inspection during business hours to agents of the Board.			
	b. Shall be separated from living areas by substantial walls and/or closable doors.			
	c. Shall be maintained in an orderly manner.			
	d. Shall be heated, lighted, & ventilated so as to be safe & comfortable to the operators & patrons.			
2	Floors, Walls and Ceilings			
	a. Floors shall be kept clean and in good repair at all times.			
	b. Walls shall be kept clean and in good repair at all times.			
	c. Ceilings shall be kept clean and in good repair at all times, furniture, and all other fixtures			
	d. Furniture shall be kept clean and in good repair at all times.			
	e. All other fixtures shall be kept clean and in good repair at all times.			
3	Instrument Cleaning			
	a. All instruments used shall be thoroughly cleaned prior to storage.			
4	Instrument Sanitizing			
	a. All instruments shall be sanitized after cleaning & prior to use, with an EPA sanitizing agent.			
	b. Every precaution shall be taken to prevent the transfer of disease-causing pathogens.			
5	Towels			
	a. Clean towels shall be used for each patron.			
	b. A clean paper or cloth neckband shall provide a sanitary barrier between a patron's neck & cape.			
	c. Paper towels & paper neckstrips shall be disposed of after one (1) use.			
6	Storage of Equipment			
	a. All instruments shall be stored in clean & closed containment after sanitizing.			
	b. All towels shall be stored in clean & closed containment after sanitizing.			
	c. All linens shall be stored in clean & closed containment after sanitizing.			
7	Dispensers			
	a. All solutions & compounds shall be maintained & dispensed in a sanitary manner.			
	b. All single-use applicators shall be disposed of after one (1) use.			
	c. All bulk & multi-use solutions & compounds shall be maintained free of foreign contaminants.			

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STATE OF IDAHO
DEPARTMENT OF SELF-GOVERNING AGENCIES
BUREAU OF OCCUPATIONAL LICENSES
IDAHO BOARD OF COSMETOLOGY

CS-6091

Inspection No. 20070724

CS-6091	3/11/1998
FINGER PRINTS	
STACIE PEABODY	
1414 BROADWAY	
BOISE, ID, 83706	

Inspection Date:	7/18/2007	Shop Phone No:	208 384-9908
Final Score:	100	Investigator:	Kevin Malveaux
Comments:			
Notes:	lgoff - 09/01/2011: OOB STACIE PEABODY Confirmed by NEW NEW SALON IN HOME		

Item	Item	Detail Notes	Weight	Points Off
8	Uniforms			
	a. All clothing worn by operators shall be clean			
	b. All clothing worn by operators shall be washable			
9	Water Supply			
	a. Water supplies shall be from an approved source.			
	b. Sufficient basins available			
	c. Hot and cold running water, & approved drainage systems			
	d. Soap shall be conveniently located within the work area			
	e. Single-use towels shall be conveniently located within the work area			
	f. Every operator and/or student shall wash their hands prior to providing service to any patron.			
10	Toilet Facilities			
	a. No adequate or convenient toilet facilities			
	b. No hot and cold running water, basin or approved disposal system			
	c. No soap			
	d. No single use towels			
	e. Failure to maintain clean or sanitary condition			
11	Safety			
	a. A clearly identifiable first-aid kit must be readily accessible on the premises.			
	b. No animals are allowed in shops or schools.			
12	Certificates			
	a. A current establishment license shall be conspicuously displayed in the work area.			
	b. Establishments must be under the direct supervision of a licensed operator.			
	c. Valid operator license(s) shall be conspicuously displayed in the work area.			
	d. A copy of the sanitary rules shall be conspicuously displayed in the work area.			
	e. A valid classification card shall be conspicuously displayed in the work area.			
13	Licenses			
	a. No establishment license			

Run Time: 4/19/2013 12:44:29 PM

STATE OF IDAHO
DEPARTMENT OF SELF-GOVERNING AGENCIES
BUREAU OF OCCUPATIONAL LICENSES
IDAHO BOARD OF COSMETOLOGY

CS-6091

Inspection No. 20070724

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STACIE PEABODY	
1414 BROADWAY	
BOISE, ID, 83706	

Inspection Date:	7/18/2007	Shop Phone No:	208 384-9908
Final Score:	100	Investigator:	Kevin Malveaux
Comments:			
Notes:	Igoff - 09/01/2011: OOB STACIE PEABODY Confirmed by NEW NEW SALON IN HOME		

Item	Item	Detail Notes	Weight	Points Off
b.	No personal operator's license			
c.	Not conspicuously displayed			
Totals for Inspection ==>			100	0

Grading - 'A' for a score of 90 through 100; 'B' for a score of 80 through 89; and 'C' for a score of 79 or below. The 'C' classification denotes unacceptable conditions. Required improvements must be demonstrated within thirty (30) days for continued operation. These inspection requirements are in accord with the laws of the State of Idaho and the rules of the IDAHO BOARD OF COSMETOLOGY.

Remarks: NT-244 1/1/08, NT-234462 1/21/08, NT-745 10/14/07, EST-233984 9/14/08

STATE OF IDAHO
DEPARTMENT OF SELF-GOVERNING AGENCIES
BUREAU OF OCCUPATIONAL LICENSES
IDAHO BOARD OF COSMETOLOGY

CS-6091

Inspection No. 20091223

CS-6091	3/11/1998
FINGER PRINTS	
STACIE PEABODY	
1414 BROADWAY	
BOISE, ID, 83706	

Inspection Date:	12/23/2009	Shop Phone No:	208 384-9908
Final Score:	95	Investigator:	Warren Schiffer
Comments:	111 121 41		
Notes:	lgoff - 09/01/2011: OOB STACIE PEABODY Confirmed by NEW NEW SALON IN HOME		

Item	Item	Detail Notes	Weight	Points Off
1	Premises			
	1. All shops and schools shall be open to inspection during business hours to authorized agents of the			
2	Floors, Walls and Ceilings			
	1. Floors, walls, ceilings, furniture, and all other fixtures shall be kept clean and in good repair at			
3	Instrument Cleaning			
	1. All instruments used by operators shall be thoroughly cleaned after each use and prior to storage an			
4	Instrument Sanitizing			
	1. All instruments used by operators shall be sanitized after cleaning and prior to use on each patron,	needs hospital grade sanitizer for files and brushes		2
5	Towels			
	1. Clean towels shall be used for each patron. A clean paper or cloth neckband shall be used to provide			
6	Storage of Equipment			
	1. All instruments, towels, and linens shall be stored in clean, closed cabinets, drawers, and/or conta			
7	Dispensers			
	1. All solutions and/or compounds shall be clearly labeled, maintained, and dispensed in a sanitary man			
8	Uniforms			
	1. All clothing worn by operators shall be clean and washable.			
9	Water Supply			
	1. Water supplies shall be from an approved source. Sufficient basins with hot and cold running water,			
10	Toilet Facilities			
	1. Clean, adequate and convenient toilet facilities, located and accessible from within the building wh			
11	Safety			
	1. Each shop and school shall have a clearly identifiable first-aid kit readily accessible on the premi	Band aids		1

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STATE OF IDAHO
DEPARTMENT OF SELF-GOVERNING AGENCIES
BUREAU OF OCCUPATIONAL LICENSES
IDAHO BOARD OF COSMETOLOGY

CS-6091

Inspection No. 20091223

CS-6091	3/11/1998
FINGER PRINTS	
STACIE PEABODY	
1414 BROADWAY	
BOISE, ID, 83706	

Inspection Date:	12/23/2009	Shop Phone No:	208 384-9908
Final Score:	95	Investigator:	Warren Schiffer
Comments:	111 121 41		
Notes:	I goff - 09/01/2011: OOB STACIE PEABODY Confirmed by NEW NEW SALON IN HOME		

Item	Item	Detail Notes	Weight	Points Off
12	Licenses and Certificates			
	I. All shops and schools must be licensed prior to their operation and must be under the direct supervi	Not conspicuous		2
Totals for Inspection			100	5

Grading - 'A' for a score of 90 through 100; 'B' for a score of 80 through 89; and 'C' for a score of 79 or below. The 'C' classification denotes unacceptable conditions. Required improvements must be demonstrated within thirty (30) days for continued operation. These inspection requirements are in accord with the laws of the State of Idaho and the rules of the IDAHO BOARD OF COSMETOLOGY.

Remarks:

**IDAHO BUREAU OF OCCUPATIONAL LICENSES
BARBER AND BEAUTY SHOP AND SCHOOL INSPECTION FORM**

IDAPA 24.04.01.800 AND 24.02.01.550

WEIGHT POINTS OFF

01. Premises. All shops and schools shall be open to inspection during business hours to authorized agents of the Cosmetology/Barber Boards. Shops and schools must be separated from living areas by substantial walls and/or closable doors. All shops and schools must be maintained in an orderly manner and shall be heated, lighted, and ventilated so as to be safe and comfortable to the operators and patrons.....	5	_____
02. Floors, Walls, and Ceilings. Floors, walls, ceilings, furniture, and all other fixtures shall be kept clean and in good repair at all times	5	_____
03. Instrument Cleaning. All instruments used by operators shall be thoroughly cleaned after each use and prior to storage and/or sanitation	15	_____
04. Instrument Sanitation. All instruments used by operators shall be sanitized after cleaning and prior to use on each patron, with a sanitizing agent registered by the Environmental Protection Agency as Hospital Grade or better. Every precaution shall be taken to prevent the transfer of disease-causing pathogens from person to person	15	<u>1</u>
05. Towels. Clean towels shall be used for each patron. A clean paper or cloth neckband shall be used to provide a sanitary barrier which shall be maintained between each patron's neck and all multi-use capes. Paper towels and paper neck-strip shall be disposed of after one (1) use	5	_____
06. Storage of Equipment. All instruments, towels, and linens shall be stored in clean, closed cabinets, drawers, and/or containers after they are cleaned and sanitized	5	<u>1</u>
07. Dispensers. All solutions and/or compounds shall be clearly labeled, maintained, and dispensed in a sanitary manner. All single-use applicators shall be disposed of after one (1) use. Paraffin, waxes and all other solutions and/or compounds shall be maintained free of any foreign contaminants.....	5	<u>1</u>
08. Uniforms. All clothing worn by operators shall be clean and washable.....	5	_____
09. Water Supply. Water supplies shall be from an approved source. Sufficient basins with hot and cold running water, approved drainage systems, soap and single-use towels shall be conveniently located within the work area. Every operator and/or student shall wash their hands prior to providing service to any patron	10	_____
10. Toilet Facilities. Clean, adequate and convenient toilet facilities, located and accessible from within the building where the shop or school is located, shall be available for use by operators and patrons. A basin with hot and cold running water, approved drainage systems, soap and single-use towels shall be provided within said facilities	10	_____
11. Safety. Each shop and school shall have a clearly identifiable first-aid kit readily accessible on the premises. No animals are allowed in shops or schools except those animals trained to provide service to the physically impaired	5	_____
12. Licenses and Certificates. All shops and schools must be licensed prior to their operation and must be under the direct supervision of a licensed operator. A current shop and/or school license, valid operator license(s) or permit(s), a copy of these rules, and a valid classification card shall be conspicuously displayed in the work area of each shop and/or school for the information of operators, Board agents, and the public in general.	15	<u>4</u>
GRAND TOTAL.....	93	7

NOTES:

- #12 CS-6091 Facility License EXPIRED 03-11-11/NOT DISPLAYED
- #12 Rules/LAWS NOT DISPLAYED
- #4 BARBASOL - needs changed
- #6 Hair in Drawer #7 Cotton Disp. uncovered

Classification of Shops and Schools. Following an inspection, each shop and school will receive a classification as follows: 100% - 90% = "A," 89% - 80% = "B," 79% and below = "C." The "C" classification denotes an unacceptable rating and improvements are required within thirty (30) days for continued operation.

Investigator: [Signature] Facility Representative: [Signature]

Inspection Date: 3-30-11

COPY TO BE RETAINED BY LICENSEE

Fellow American College of Foot Surgeons
Diplomate American Board of Podiatric Surgery
Member American Podiatric Medical Association

JEFFREY L. CHANDLER, D.P.M., P.A.

Ankle & Foot Center

May 8, 2013

Regarding Tracy Sales

1. What is the nature and extent of your diagnosis with respect to any injuries or conditions pertaining to Tracy Sales' foot post April 19, 2010?

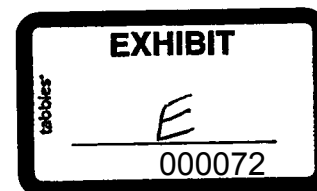
I first saw Ms. Tracy Sales on December 27, 2010 with a chief complaint of ongoing pain, swelling and erythema of her right toe. Ms. Sales stated she had a pedicure in April 2010 and "it has gone downhill from there." Ms. Sales stated she has seen a physician for this problem; was placed on antibiotics and a pick-line. We performed a history exam with X-Rays, and it was thought Ms. Sales may have had an ingrown toe nail stemming from the April 2010 pedicure.

At this time, we decided to excise the right lateral border under local anesthesia. We placed the local anesthetic block and proceeded to excise the lateral border. Phenol (Carbolic Acid) was used to kill the root and avulsion of nail was performed to ensure infection was not staying underneath the nail. The foot was dressed with dry sterile dressing after Neosporin and a betadine adaptec was applied to the nail bed and instructions to soak as directed. Ms. Sales was to return for follow-up care at a later date.

On December 28th, 2010, Ms. Sales called complaining she was unable to soak her foot due to the pain. She was seen in office and the right toe looked as if there was a decrease in redness and swelling.

On January 3, 2011, Ms. Sales was seen for routine follow-Up care. She stated that it appears to be healing and then flairs up again. It was noted that redness and swelling had decreased.

Ms. Sales was seen in office on January 17, 2011 for a pre-operative appointment. Per the history and physical, Ms. Sales had a nail trim, polishing and pedicure at a salon and from there "it all went downhill." She was seen by another physician and placed on antibiotics as well as a PICC line with no resolution. A partial matrixectomy was performed on December 27, 2010 using phenol. In doing the Phenolization, a sac of fluid was eventually extruded from the wound and as of this date, the matrixectomy appears to be healing okay, but



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Diplomate American Board of Podiatric Surgery
Member American Podiatric Medical Association

JEFFREY L. CHANDLER, D.P.M., P.A.

Ankle & Foot Center

the joint still appears to be inflamed, and a decision to take a bone scan to check for a "hot spot" was made.

The decision to open the joint, clean it out and culture it in surgery was made to ensure there was no osteomyelitis.

Ms. Sales was brought to the OR in satisfactory condition and placed on the OR table in the supine position under local anesthetic. The right foot was prepped, draped and lowered into the sterile field. A Penrose drain was used to prevent bleeding and then an incision was made across the dorsal aspect of the IPJ. The incision was deepened through sharp and blunt dissection. The bleeders were clamped and tied and an incision was carried down into the capsule. The capsule was opened. There was not much fluid in the capsule. In the joint, however, was fluid that was sent for culture. It appeared to be clean. We suspected because she has a history of psoriasis that this is probably a psoriatic arthritic joint. We inspected the joint and there appeared to be no apparent damage done, just minor inflammation of the toe. The wound was irrigated and then closed with 4-0 Vicryl across the joint and across the tendon to recoapt the extensor tendon x 2 and then the skin was closed with 4-0 Prolene. We placed some Depo-Medrol into the joint for anti-inflammatory. She was put on Cipro 750mg at this time.

Ms. Sales was seen on January 20th, 2011 for a bandage change and the edema seemed to be subsiding. She was then seen on February 1st to have sutures removed and to then be seen in another month. On the 28th of February she returned to the office with concerns that her toe was still swollen and red. It appeared she was still having an arthritic process and was given Fildene 20mg. At this time we decided to look for mycobacteria.

On March 14th we did a local anesthetic and biopsied a tissue to send to St. Luke's. The results indicated there was no fungus or yeast isolated.

In answer to the question, I felt that at first it might be an ingrown toe nail; then thought might be psoriatic arthritis. However as this continued to be on going and no other lesions or psoriatic joint processes in any other place in her body except where the toe had been worked on by this salon in April of 2010, we determined that it was a mycobacterial infection that was a result from the incident Tracy Sales had at the Salon.

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JEFFREY L. CHANDLER, D.P.M., P.A.

Ankle & Foot Center

2. Is there a causal relationship between the injuries or conditions set forth in your answer above and the incident of April 19, 2010, incident involving Tracy Sales, Stacie Peabody dba Finger Prints Day Spa, and Linda Cook? If so, upon what do you base your opinion?

I do believe there is a causal relationship between the injuries Ms. Sales sustained and the treatment she received as a result to the incident at the salon in April 2010. She never has any joint inflammation or lesions anywhere on her body up to this point, and after the incident that occurred on April 2010 is when she began to experience these problems.

3. Has the treatment Tracy Sales received for her incident-related injuries proximately resulting for the April 19, 2010, incident been reasonable and necessary?

Yes, in my medical opinion I believe she has received treatment for her incident related injuries that has been both reasonable and necessary.

4. Are the costs for the treatment Ms. Sales has received for her incident-related injuries proximately resulting for April 19, 2010 incident reasonable and in accordance with rates charged in your profession for similar services?

Yes, I am a board certified member of American Medical Podiatric Association, Idaho Podiatric Medical Association, and am providers for Blue Cross and Blue Shield and most other insurance related companies, and I am within the cost of most other doctors in my profession.

5. What is your prognosis with respect to Tracy sales' foot injuries and/or conditions?

Note that we did go on to find osteomyelitis in her foot after doing an MRI. The bone scan was positive and then the MRI was done and was positive. We had to go in and removed a portion of the joint of the bone and sent that tissue in and they were never able to isolate what the infectious process was. We determined once again that it was mycobacteria.

6. What is the nature and extent of any incident-related limitations, restrictions, or impairments, as well as applicable dates or time periods of such limitations, restrictions, or impairments as it pertains to Tracy Sales?

Fellow American College of Foot Surgeons
Diplomate American Board of Podiatric Surgery
Member American Podiatric Medical Association

JEFFREY L. CHANDLER, D.P.M., P.A.

Ankle & Foot Center

We explained to Ms. Sales that if this continues we might need to fuse her joint to eliminate the infectious process by cutting out the infected joint and then fusing it together, however, after her surgery in which we removed a portion of the joint, the infectious process appears to have subsided. She does still occasionally have some pain with her toe but not to the extent it was prior to the intervention and removing that portion of that joint.

7. What additional treatments, if any, do you recommend for Tracy Sales at this time?

It was explained to her we could fuse the joint, but the fusion was not necessary if the pain was not significant to need such treatment.

8. What is the nature, extent, and reasonable cost estimate of any future medical treatment and/or procedures that Tracy Sales will need as a proximate result of her incident-related injuries sustained because the April 19, 2010, incident?

If she has to have a fusion of the Inter Phalangeal Joint (IPJ) the cost for code 28760 for the doctors' fees would be \$1,604.00 and for the surgery center would be \$1,734.00; hardware would be between \$200-\$400.

9. Any other observations or medical opinions that may have related to the injuries, medical complaints, limitations, on-going impairments, and future medical treatment Tracy Sales has received or will received for her incident-related injuries proximately resulting from the April 19, 2010, incident?

Not at this time.

10. What documentation have you reviewed in formulating your opinions and responses to the above questions?

In addition to copies of the bone scan, MRI, x-rays, pertinent medical records and billing were all reviewed.

11. What are your credentials, licenses, specialties, and professional associations or attainments?

I graduated from medical school in 1974 in San Francisco and did my residency at Beach Community Hospital. I taught 3 years at UCUA Medical Center. I was board certified in 1980 from the American Board of Podiatric Surgery, also received my Ankle and Foot Medical Board of Podiatric Surgery, was a National Honor Society Member, and in the top 5 in class in medical school.

Fellow American College of Foot Surgeons
Diplomate American Board of Podiatric Surgery
Member American Podiatric Medical Association

JEFFREY L. CHANDLER, D.P.M., P.A.

Ankle & Foot Center

12. What professional publications, articles, or other similar writings have you authored or co-authored within that last ten years?

I have not written and articles.

13. What is your compensation for providing your expert opinions in this action?

Approx. \$500.00, if we have to go to court it will be more than that.



Jeffrey Chandler

Moody
Cinderella
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D

NO. _____
A.M. _____ P.M. _____
FILED _____

MAY 21 2013

CHRISTOPHER D. RICH, Clerk
By JAMIE MARTIN
DEPUTY

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Attorneys for Defendants
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Finger Prints Day Spa

ORIGINAL

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

TRACY SALES, individually,

Plaintiff,

vs.

STACIE PEABODY, individually and
doing business under the assumed name
of FINGERPRINTS DAY SPA; and
LINDA COOK, individually,

Defendants.

Case No. CV PI 1206516

DEFENDANTS STACIE PEABODY
AND FINGERPRINTS DAY SPA'S
REPLY MEMORANDUM IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT

I. INTRODUCTION

First, Plaintiff has not put forth any competent evidence of negligence (neither breach nor causation) on the part of Defendants Stacie Peabody or Fingerprints Day Spa (referred to herein collectively as "Ms. Peabody"). That is, the "expert report of Doug Schoon" and "expert opinions of Dr. Jeffrey Chandler" are inadmissible hearsay, and

should not be considered by the Court on summary judgment. Also, the Idaho State Bureau of Occupational Licenses records are inadmissible under Idaho Rule of Evidence 404(b). With the exclusion of those materials, the only evidence in the record for the Court possibly to consider are the Affidavits of Linda Cook, Affidavit of Stacie Peabody, deposition of Stacie Peabody and portions of the deposition of Tracy Sales. None of those materials provide any evidence of negligence by Ms. Peabody. **In fact, regardless of what the Court considers, the Plaintiff cannot establish a causal link between the matters raised and the infection Plaintiff allegedly experienced.**

Second, the [Second] Affidavit of Linda Cook¹ lacks foundation and does not establish a genuine issue of material fact with regard to Plaintiff's vicarious liability claim. Specifically, in her Second Affidavit Ms. Cook makes vague, irrelevant and conclusory statements. Such statements do not comport with the requirements of Idaho Rule of Civil Procedure 56(e), and therefore are inadmissible. Further, the statements in Ms. Cook's Second Affidavit (even if they were admissible here) do not establish that Ms. Peabody retained the kind of control over the cosmeticians at Fingerprints Nail Spa that would give rise to vicarious liability.

Plaintiff has failed to put forth admissible evidence sufficient to create a genuine issue of material fact with regard to any of her claims. Accordingly, summary

¹ Ms. Cook has filed two affidavits. The first affidavit was filed contemporaneous with the present Motion for Summary Judgment (April 25, 2013), and the [Second] Affidavit of Linda Cook was filed contemporaneous with Plaintiff's Memorandum in Opposition (May 14, 2013). For purposes of this Reply, the two affidavits will be referred to as the First Affidavit and Second Affidavit, respectively.

judgment in favor of Ms. Peabody, dismissing Plaintiff's action against Ms. Peabody, is appropriate.²

II. ARGUMENT

A. The Affidavit of James E. Jacobson and Second Affidavit of Linda Cook Do Not Comply With the Requirements of Idaho Rule of Civil Procedure 56(e), and Therefore Are Not Admissible.

For an affidavit to be admissible in opposition to summary judgment, the Idaho Rules of Civil Procedure require, in part, that the "opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated." **Id. R. Civ. Pro. 56(e)** (emphasis added). The question of admissibility of affidavits under Rule 56(e) is "a threshold question to be analyzed before applying the liberal construction and reasonable inferences required in motions for summary judgment." ***Rhodehouse v. Stuttz***, 125 Idaho 208, 868 P.2d 1224 (1994); ***Montgomery v. Montgomery***, 147 Idaho 1, 6, 205 P.3d 650, 655 (2009) ("[T]rial courts must determine the admissibility of evidence as a 'threshold question' to be answered before addressing the merits of motions for summary judgment.").

1. The Schoon and Chandler materials are inadmissible hearsay, and the Bureau of Occupational Licenses records are inadmissible evidence under I.R.E. 404(b).

The Affidavit of James E. Jacobson in Opposition to Defendant's Motion for Summary Judgment ("Aff. James E. Jacobson") does not comply with the requirements of Idaho Rule of Civil Procedure 56(e) with respect to the "expert report of Doug Schoon" and

² Plaintiff's position that Ms. Peabody has moved for summary judgment on only the vicarious liability claim is mistaken. Ms. Peabody clearly moved "for entry of Summary Judgment dismissing this action against Ms. Peabody." **Defs.' Mot. S.J.** (April 25, 2013) (emphasis added). The action, as distinguished from a claim, is the entire lawsuit, in aggregate. See Black's Law Dictionary.

“expert opinions of Dr. Jeffrey Chandler,” attached thereto as Exhibits C and E, respectively. The Schoon and Chandler materials therefore are not admissible in opposition to Ms. Peabody’s Motion for Summary Judgment.

Idaho Rule of Civil Procedure 56(e) provides, in pertinent part:

Form of Affidavits - Further Testimony - Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

I.R.C.P. 56(e) (emphasis added). Mr. Jacobson has attached the Schoon and Chandler materials to his affidavit, but he obviously does not have the required personal knowledge of any of the matters set forth therein. Only the authors of those materials, if anyone, would have such personal knowledge. Thus, in order to be admissible in opposition to summary judgment, Plaintiff at least was required to submit affidavits by the authors of the Schoon and Chandler materials.

Without the required affidavits by the authors of the Schoon and Chandler materials, those materials are unauthenticated hearsay for which no exception pertains. Hearsay is generally not admissible in evidence. **Idaho R. Evid. 802**. Therefore, hearsay may not, under Rule 56(e), be relied upon in an affidavit. See e.g., **State v. Shama Resources Ltd.**, 127 Idaho 267, 899 P.2d 977 (1995). Accordingly, the Schoon and Chandler materials are not admissible in opposition to the present Motion. See **Cates v. Albertson’s**, 126 Idaho 1030, 1034, 895 P.2d 1223, 1227 (1995) (excluding the affidavit of the plaintiff’s counsel, which included references to attached exhibits, where the affidavit failed to establish that plaintiff’s counsel had any personal knowledge regarding the

attached exhibits). Such inadmissible evidence fails to meet the standard of Rule 56(e). *Id.* See also ***Fragnella v. Petrovich***, 281 P.3d 103, 110–111 (Idaho 2012). Of course, any reference to or argument based on those materials likewise is improper.

In addition, the Idaho State Bureau of Occupational Licenses records are inadmissible under Idaho Rule of Evidence 404(b). Rule 404(b) provides, in part, that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith.” In reference to the Idaho State Bureau of Occupational Licenses records, Plaintiff complains that the “investigation” (routine “inspection,” really, as indicated on the inspection records themselves) “found problems with instrument sanitization.” Plaintiff clearly seeks to introduce these records in order to give the impression that Ms. Peabody generally was lax in sanitizing her equipment—that is precisely what is prohibited by Rule 404(b).

Furthermore, a closer look at the inspection records shows only that “hospital grade sanitizer for files and brushes” was needed in 2009. Plaintiff has not alleged that she was injured by Ms. Peabody’s files and/or brushes. There is, in fact, no dispute that Ms. Peabody never performed any services on Plaintiff, and that Ms. Cook used her own instruments (including her own files and brushes). Thus, the records also are inadmissible because they are irrelevant. See **I.R.E. 402**.

2. *The [Second] Affidavit of Linda Cook does not set out facts as would be admissible in evidence.*

For an affidavit to be admissible in opposition to summary judgment, the Idaho Rules of Civil Procedure require, in part, that the “opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and

show that the affiant is competent to testify on the matters stated.” **Id. R. Civ. Pro. 56(e)**. Because Ms. Cook’s Second Affidavit does not, in several respects, meet those requirements, it is inadmissible in these proceedings. See *e.g.*, **Ivey v. State**, 123 Idaho 77, 844 P.2d 706 (1992). Specifically, the Second Affidavit should be stricken and excluded because: it is not supported by personal knowledge, is based on hearsay, lacks foundation, is conclusory, conflicts with Ms. Cook’s prior testimony, and otherwise presents evidence that would not be admissible in court.

Paragraph 4 of the Second Affidavit is irrelevant to the issues at hand and lacks foundation. The time period relevant to this matter is April 2010. Paragraph 4 refers to an isolated incident allegedly occurring more than one and one-half years after the relevant time period, which incident cannot reasonably be considered relevant to these proceedings. Therefore, Paragraph 4 is not admissible. **I.R.E. 402** (“Evidence which is not relevant is not admissible.”). Also, Paragraph 4 vaguely refers to how the affiant was “made to feel.” However, the affiant does not, as required by Rule 56(e), attest to facts of which she has actual *personal knowledge* to provide a plausible foundation for her alleged feelings. Such facts might include specific statements by someone that “made [her] feel” a certain way, but no such specific facts are attested to in the Second Affidavit. Again, Paragraph 4 is inadmissible. The remainder of Paragraph 4 does provide a plausible explanation for Ms. Cook’s feelings, and makes clear that Ms. Cook’s feelings were the result of an independent business decision to participate in the coupon incentive. In other words, her own business sense “made [her] feel” that it was in her best interest to participate in the coupon incentive, which she did for the good of her own business. At any rate, she clearly was not required to participate.

Paragraph 5 contains irrelevant information, is conclusory, lacks foundation, and conflicts with Ms. Cook's prior testimony. First, it is irrelevant whether the lease agreement between Ms. Peabody and Ms. Cook was written or oral, and Ms. Cook's statement that she "did not have a written lease agreement" is therefore inadmissible (it is, however, telling that Ms. Cook never has denied that she had a lease agreement with Ms. Peabody). See **I.R.E. 402**.

Second, Ms. Cook's statements regarding her "understanding" of how the cleaning duties at Fingerprints Day Spa were allocated are inadmissible, because she has provided no foundation for her purported understanding. That is, Ms. Cook again, as in Paragraph 4, fails to attest to any specific facts from which she derived her purported understanding. Rather, she refers vaguely to an "understanding," a vague and imprecise term that, by no means, indicates knowledge on the Affiant's part. This uncertainty is highlighted by the fact that she provides no indication regarding why or how she came to such an understanding of this purported state of affairs. The only reasonable conclusion is that the understanding of which Affiant speaks is a product of inference; it is not a "set[ting] out of facts" based on personal knowledge. Therefore, the statements regarding this so-called "understanding" should be excluded.

Finally, Ms. Cook's statements regarding her purported understanding of the cleaning duties directly conflict with prior testimony, and therefore should be stricken under the sham affidavit doctrine. See ***Tolmie Farms, Inc. v. J.r. Simplot Co., Inc.***, 124 Idaho 607, 862 P.2d 299 (1993) ("[W]e agree that the purpose of summary judgment is served by a rule that prevents a party from creating sham issues by offering contradictory

testimony . . ."). When read in conjunction with Ms. Cook's statement in Paragraph 6 regarding her use of the foot basins, her purported "understanding" does not make sense, and directly conflicts with her testimony in the First Affidavit that she "had full control over my business hours, methods, tools and implements." **First Affidavit ¶ 3.** Clearly, if Ms. Cook was using the foot basins and "had full control over" them, it was not Ms. Peabody's responsibility to clean them for her. Ms. Cook has provided no explanation for the contradictory testimony, and the same therefore should be stricken.

Paragraph 6 largely suffers from the same deficiencies as Paragraph 5. Specifically, Ms. Cook provides no foundation for her conclusory statement regarding her purported understanding of the cleaning duties at Fingerprints Nail Spa. Accordingly, those statements likewise should be stricken.

The deficiencies of Paragraph 7 almost are without limit. First, Ms. Cook's statement that lease rates were increased in 2008 "to hire someone to clean the work stations," without more, is irrelevant to the issues here. Ms. Cook has not testified in her affidavit that Ms. Peabody actually hired anyone to take on cleaning duties at the salon in 2008, provided any details regarding what those cleaning duties allegedly entailed, or affirmed that the cleaning situation that existed in 2008 (whatever it was) continued for the next two years until the relevant time period. In other words, the only possible relevance of Ms. Cook's statement about the lease increase is that it affirms that the cosmeticians at Fingerprints Nail Spa were operating as lessees, not employees. Second, Ms. Cook has not provided any specific facts to support how she purportedly knows why the lease rates were increased. Her statement reflects only a supposition regarding the motives of a person not the Affiant. As such, it lacks foundation and cannot be based on personal

knowledge of the Affiant. It therefore violates the requirements of the Idaho Rules of Evidence and Rule 56(e) of the Idaho Rules of Civil Procedure, and it should be excluded. The remainder of the content of Paragraph 7 is utterly vague, lacking in specificity, and/or irrelevant and therefore is inadmissible.

B. Plaintiff Has Failed to Create A Genuine Issue of Material Fact With Regard to Any of Her Claims Against Ms. Peabody.

Summary judgment is “not a disfavored procedural shortcut;” rather, it is the “principal tool . . . by which factually insufficient claims or defenses [can] be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources.” *Paugh v. Ottman*, 2008 U.S. Dist. LEXIS 52281, *9-10 (D. Idaho 2008) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 377 (1986) (alterations in original)). A party moving for summary judgment “need not introduce affirmative evidence (such as affidavits or deposition excerpts) but may simply point out the absence of evidence to support the non-moving party’s case.” *Paugh*, 2008 U.S. Dist. LEXIS 52281 at *10-11 (citing *Fairbanks v. Wunderman Cato Johnson*, 212 F.3d 528, 532 (9th Cir. 2000) (emphasis added)). At that point, the burden is shifted “to the non-moving party to produce evidence sufficient to support a jury verdict in her favor.” *Id.*

1. *Plaintiff has not put forth admissible evidence to support a claim of negligence against Ms. Peabody.*

Ms. Peabody has pointed out that Plaintiff has no evidence to support her case against Ms. Peabody. Thus, the burden shifted to Plaintiff to come forward with admissible evidence “sufficient to support a jury verdict in her favor.” *Id.* As demonstrated above, the Schoon and Chandler materials, as well as the Bureau of Occupational

Licenses Idaho Board of Cosmetology inspection records, are inadmissible as evidence in opposition to the present Motion. Plaintiff's other submissions do not satisfy her burden in seeking to oppose the present Motion for Summary Judgment.

Preliminarily, the cases cited by Plaintiff in support of her premises liability analysis are inapposite. There is no dispute Plaintiff was an invitee of Linda Cook, and that Ms. Peabody did not perform services for Plaintiff or oversee the services provided by Ms. Cook (see First Affidavit of Linda Cook ¶ 4; Aff. Stacie Peabody ¶ 8). Nor is it alleged that the Plaintiff was injured while in the employment of Ms. Peabody. Therefore, Ms. Peabody owed, at most, only a duty of ordinary care to the Plaintiff. See **Stephens v. Stearns**, 106 Idaho 249, 678 P.2d 41 (1984). Under that analysis, it is clear that Plaintiff cannot establish that Ms. Peabody breached any duty owed to her, nor that any alleged breach of duty proximately caused Plaintiff's injuries, if any.

First, even if admissible (which they are not), the Bureau of Occupational Licenses Idaho Board of Cosmetology inspection records (**Aff. James E. Jacobson**, Exhibit D), far from supporting a claim of negligence, actually demonstrate Ms. Peabody's exceptional level of compliance with all applicable rules and guidelines. The inspection records indicate that Ms. Peabody received an "A" rating each and every time the salon was inspected. **Aff. James E. Jacobson**, Exhibit D. An "unacceptable condition" is denoted by a "C" rating. Thus, Ms. Peabody passed all inspections with flying colors, and counsel's disingenuous nitpicking amounts to nothing.

Moreover, the inspection records relate only to inspections of Fingerprints Nail Spa and Stacie Peabody, not to the other cosmeticians leasing space from Ms.

Peabody, such as Ms. Cook. *Id.* Conspicuously, Plaintiff did not request similar records pertaining to Ms. Cook and/or the other cosmeticians, although Ms. Peabody testified that the Bureau of Occupational Licenses inspected each of the individual lessees and provided inspection results for each. See **Subp. Duces Tecum** (April 11, 2013); **Aff. James E. Jacobson** Exhibit A (Depo. Stacie Peabody 31:9 to 32:6). Thus, Plaintiff's claim that the inspection records contradict Ms. Peabody's testimony is utterly unsupported.

Also, Ms. Peabody's unrebutted testimony demonstrates that she took every reasonable precaution to ensure the salon was appropriately cleaned, and that all her instruments were sanitized. For instance, Ms. Peabody testified as follows regarding her cleaning and sanitation procedures:

Q: You were responsible for the cleaning and sanitation of the equipment at the salon back in 2010; is that right?

MR. WRIGHT: Object to the form. Misstates prior testimony.

Q: (BY MR. JACOBSON) Go ahead and answer if you can.

A: I am responsible for when I use the pedicure stations or any other thing in the salon, that I don't rely on the last person, who should have cleaned and sanitized it. I take my own initiative and sanitize it again before my personal clients.

[. . .]

Q: What was your procedure or protocol for cleaning and sanitizing the equipment that you used at the salon back in 2010?

A: Well, I would clean the pedicure chair, whether it looked clean or not. And I would run some Let's Touch through the jets. And all my implements were always soaked in Barbicide or put in the autoclave before and after every client.

Q: So you went through that cleaning routine before and after

—

A. Correct.

Aff. James E. Jacobsen Exhibit A (Depo. Stacie Peabody 28:24 to 29:25) *see also* **Id.** at 43:24 to 45:9. Those actions go above and beyond the applicable requirements of Idaho Code § 54-824A, which requires that each individual licensee sanitize his or her implements “prior to use on each patron.” Obviously, it would be improper (and prohibited by statute) for any of the technicians to rely on the cleaning/sanitation practices of someone else, yet that is the premise on which Plaintiff’s argument rests: that Ms. Cook relied on Ms. Peabody to sanitize the foot basins for her. Plaintiff’s argument is absurd on its face, and contrary to the Idaho Code requirements.

Further, there is no evidence that Ms. Peabody’s own cleaning/sanitation practices were improper, as Plaintiff suggests. Plaintiff’s counsel never asked Ms. Peabody to describe in any detail her use of Let’s Touch sanitizer, but now asks the Court to assume, without any evidence at all, that Ms. Peabody used it incorrectly—“in violation of federal law,” as Plaintiff puts it (even though Ms. Peabody has been a licensed cosmetologist owning Fingerprints Day Spa for approximately twenty-five years (**Id.** at 7:6-8)). Any such assumption is entirely unwarranted and would conflict with the record, which demonstrates that Ms. Peabody always received “A” ratings from the Bureau of Occupational Licenses. *See* **Aff. James E. Jacobsen** Exhibit A (Depo. Stacie Peabody 30:10-21).

Finally, Plaintiff cannot possibly establish proximate cause. Plaintiff alleges that “[d]uring the pedicure Plaintiff’s right toe was punctured or otherwise injured by an instrument or instruments being used to perform the pedicure. Defendant Linda Cook performed the pedicure on the date of the incident at Defendant Peabody’s facility.” **Plf.’s**

Compl. ¶ VII (emphasis added). In other words, Plaintiff alleges that the injury, if any, resulted from Ms. Cook's actions. Thus, even if Ms. Peabody had any responsibility for cleaning the foot basins for the lessees (which Ms. Peabody denies), there is no evidence in the record that she failed to do so, or that failing to do so caused any injury to Plaintiff. There is not even evidence that the foot basin used on Plaintiff was unclean! Beyond pure speculation, it is difficult to conceive how any link between Ms. Peabody's actions (or inactions) and Plaintiff's alleged injuries could be established. To date, Plaintiff certainly has failed to put forth any evidence of such a link. This failure is determinative and fatal to Plaintiff's action.

2. Plaintiff has not put forth evidence sufficient to create a genuine issue of material fact with regard to her respondeat superior claim.

The clear record in this case shows there existed only a lessor/lessee (or, at most, independent contractor) relationship between Ms. Peabody and Defendant Linda Cook. Neither of those relationships is sufficient to support a claim of vicarious liability.

The key to imposing vicarious liability rests on the right of control. See ***Joslin v. Idaho Times Publishing Co.***, 56 Idaho 242, 253-54, 53 P.2d 323, 328 (1935); ***Gneiting v. Idaho Asphalt Supply***, 130 Idaho 393, 394-395 (Idaho Ct. App. 1997); ***Anderson v. Farm Bureau Mutual Insurance Co. of Idaho***, 112 Idaho 461, 464-65, 732 P.2d 699, 702-3 (Ct. App. 1987). There is no evidence that Ms. Peabody retained anything like the kind of control that the Idaho Courts have found sufficient to impose vicarious liability.

Ms. Peabody has put forth her own Affidavit stating that she retained no "right to control any aspect of Linda Cook's work and/or business practices." **Aff. Stacie Peabody ¶ 4**. In her First Affidavit, Ms. Cook confirms that: "I had full control over my

business hours, methods, tools and implements”; “Neither Stacie Peabody nor Fingerprints Day Spa had any control over my work; nor did they supervise my services provided to the Plaintiff.” **First Aff.** (of Linda Cook) ¶¶ 3, 4. Nothing in the materials submitted by Plaintiff (admissible or otherwise) in opposition to the present motion contradicts those statements. Thus, the vicarious liability claim is subject to immediate dismissal.

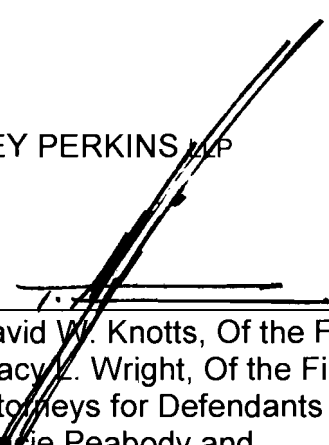
III. CONCLUSION

Plaintiff has not put forth admissible evidence to support her claims against Ms. Peabody. Therefore, Ms. Peabody is entitled to summary judgment dismissing Plaintiff's claims in this action, and respectfully requests this Court enter the same.

DATED this 21st day of May, 2013.

CAREY PERKINS LLP

By



David W. Knotts, Of the Firm
Tracy L. Wright, Of the Firm
Attorneys for Defendants
Stacie Peabody and
Finger Prints Day Spa

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of May, 2013, I served a true and correct copy of the foregoing DEFENDANTS STACIE PEABODY AND FINGERPRINTS DAY SPA'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT by delivering the same to each of the following, by the method indicated below, addressed as follows:

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Robert W. Jacobson
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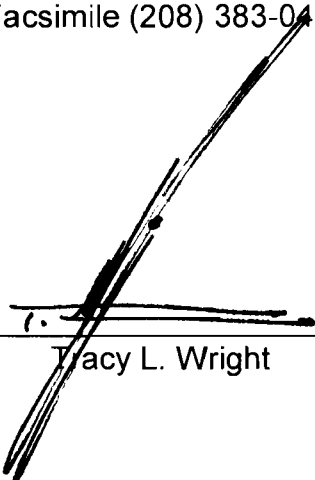
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Tracy L. Wright

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MAY 23 2013

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By CHELSIE PINKSTON
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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRACY SALES, individually;

Plaintiff,

vs.

STACIE PEABODY, individually and doing
business under the assumed name of
FINGERPRINTS DAY SPA; and LINDA
COOK, individually;

Defendants.

Case No. CV PI 1206516

AFFIDAVIT OF
JEFFREY L. CHANDLER, D.P.M.

STATE OF IDAHO)
) ss:
County of Ada)

JEFFREY L. CHANDLER, D.P.M., being first duly sworn upon oath, deposes
and says:

1. That this Affidavit of Jeffrey L. Chandler, D.P.M. is submitted in support of Plaintiff's Opposition to Defendants Stacie Peabody and Fingerprints Day Spa's Motion for Summary Judgment.

2. That Affiant is a practicing board certified podiatrist.

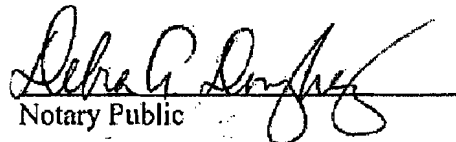
3. That attached hereto is Exhibit A, a true and correct copy of my opinion letter dated May 8, 2013, which contains information as to my qualifications as an expert and my opinions expressed in this action pursuant to Idaho Rules of Evidence 702-705 and as disclosed pursuant to Idaho Rules of Civil Procedure 26(b)(4).

FURTHER, your Affiant sayeth naught.


Jeffrey M. Chandler, D.P.M.

SUBSCRIBED AND SWORN to before me this 22nd day of May, 2013.




Notary Public

Residing at Eagle Idaho
My Commission expires: 10-22-16

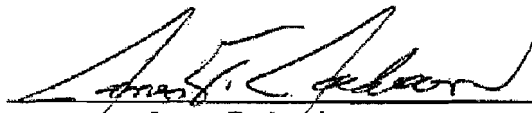
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of May, 2013, a true and correct copy of the **AFFIDAVIT OF JEFFREY L. CHANDLER, D.P.M.** was served on the following attorneys of record via method of delivery below:

David W. Knotts; Tracy L. Wright	<input type="checkbox"/>	U.S. Mail, postage prepaid
Carey Perkins, LLP	<input type="checkbox"/>	Hand-Delivered
Capitol Park Plaza	<input type="checkbox"/>	Overnight Mail
300 N. 6 th Street, Ste. 200	<input checked="" type="checkbox"/>	Facsimile (208) 345-8660
P. O. Box 519		
Boise, ID 83701		
<i>Attorneys for Defendant, Stacie Peabody and Fingerprints Day Spa</i>		

Jeffrey P. Heineman	<input type="checkbox"/>	U.S. Mail, postage prepaid
Heineman Law Office	<input type="checkbox"/>	Hand-Delivered
1501 Tyrell Lane	<input type="checkbox"/>	Overnight Mail
Boise, ID 83706	<input checked="" type="checkbox"/>	Facsimile (208) 343-5200
<i>Attorney for Defendant, Linda Cook</i>		

Margalit Z. Ryan	<input type="checkbox"/>	U.S. Mail, postage prepaid
Bauer & French	<input type="checkbox"/>	Hand-Delivered
P. O. Box 2730	<input type="checkbox"/>	Overnight Mail
Boise, ID 83701	<input checked="" type="checkbox"/>	Facsimile (208) 383-0412
<i>Attorney for Defendant, Linda Cook</i>		


James F. Jacobson

2012-05-08 14:13 Ankle and Foot

2083444549 >>

Unknown

P 2/6

Fellow American College of Foot Surgeons
Diplomate American Board of Podiatric Surgery
Member American Podiatric Medical Association

JEFFREY L. CHANDLER, D.P.M., P.A.

Ankle & Foot Center

May 8, 2013

Regarding Tracy Sales

1. What is the nature and extent of your diagnosis with respect to any injuries or conditions pertaining to Tracy Sales' foot post April 19, 2010?

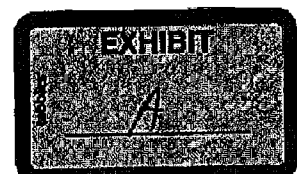
I first saw Ms. Tracy Sales on December 27, 2010 with a chief complaint of ongoing pain, swelling and erythema of her right toe. Ms. Sales stated she had a pedicure in April 2010 and "it has gone downhill from there." Ms. Sales stated she has seen a physician for this problem; was placed on antibiotics and a pick-line. We performed a history exam with X-Rays, and it was thought Ms. Sales may have had an ingrown toe nail stemming from the April 2010 pedicure.

At this time, we decided to excise the right lateral border under local anesthesia. We placed the local anesthetic block and proceeded to excise the lateral border. Phenol (Carbolic Acid) was used to kill the root and avulsion of nail was performed to ensure infection was not staying underneath the nail. The foot was dressed with dry sterile dressing after Neosporin and a betadine adaptec was applied to the nail bed and instructions to soak as directed. Ms. Sales was to return for follow-up care at a later date.

On December 28th, 2010, Ms. Sales called complaining she was unable to soak her foot due to the pain. She was seen in office and the right toe looked as if there was a decrease in redness and swelling.

On January 3, 2011, Ms. Sales was seen for routine follow-up care. She stated that it appears to be healing and then flairs up again. It was noted that redness and swelling had decreased.

Ms. Sales was seen in office on January 17, 2011 for a pre-operative appointment. Per the history and physical, Ms. Sales had a nail trim, polishing and pedicure at a salon and from there "it all went downhill." She was seen by another physician and placed on antibiotics as well as a PICC line with no resolution. A partial matrixectomy was performed on December 27, 2010 using phenol. In doing the Phenolization, a sac of fluid was eventually extruded from the wound and as of this date, the matrixectomy appears to be healing okay, but



2012-05-08 14:13 Ankle and Foot

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unknown

P 3/6

Fellow American College of Foot Surgeons
Diplomate American Board of Podiatric Surgery
Member American Podiatric Medical Association

JEFFREY L. CHANDLER, D.P.M., P.A.

Ankle & Foot Center

the joint still appears to be inflamed, and a decision to take a bone scan to check for a "hot spot" was made.

The decision to open the joint, clean it out and culture it in surgery was made to ensure there was no osteomyelitis.

Ms. Sales was brought to the OR in satisfactory condition and placed on the OR table in the supine position under local anesthetic. The right foot was prepped, draped and lowered into the sterile field. A Penrose drain was used to prevent bleeding and then an incision was made across the dorsal aspect of the IPJ. The incision was deepened through sharp and blunt dissection. The bleeders were clamped and tied and an incision was carried down into the capsule. The capsule was opened. There was not much fluid in the capsule. In the joint, however, was fluid that was sent for culture. It appeared to be clean. We suspected because she has a history of psoriasis that this is probably a psoriatic arthritic joint. We inspected the joint and there appeared to be no apparent damage done, just minor inflammation of the toe. The wound was irrigated and then closed with 4-0 Vicryl across the joint and across the tendon to recoat the extensor tendon x 2 and then the skin was closed with 4-0 Prolene. We placed some Depo-Medrol into the joint for anti-inflammatory. She was put on Cipro 750mg at this time.

Ms. Sales was seen on January 20th, 2011 for a bandage change and the edema seemed to be subsiding. She was then seen on February 1st to have sutures removed and to then be seen in another month. On the 28th of February she returned to the office with concerns that her toe was still swollen and red. It appeared she was still having an arthritic process and was given Fildene 20mg. At this time we decided to look for mycobacteria.

On March 14th we did a local anesthetic and biopsied a tissue to send to St. Luke's. The results indicated there was no fungus or yeast isolated.

In answer to the question, I felt that at first it might be an ingrown toe nail; then thought might be psoriatic arthritis. However as this continued to be on going and no other lesions or psoriatic joint processes in any other place in her body except where the toe had been worked on by this salon in April of 2010, we determined that it was a mycobacterial infection that was a result from the incident Tracy Sales had at the Salon.

2012-05-08 14:13 Ankle and Foot

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Unknown

P 4/6

Fellow American College of Foot Surgeons
Diplomate American Board of Podiatric Surgery
Member American Podiatric Medical Association

JEFFREY L. CHANDLER, D.P.M., P.A.

Ankle & Foot Center

2. Is there a causal relationship between the injuries or conditions set forth in your answer above and the incident of April 19, 2010, incident involving Tracy Sales, Stacie Peabody dba Finger Prints Day Spa, and Linda Cook? If so, upon what do you base your opinion?

I do believe there is a causal relationship between the injuries Ms. Sales sustained and the treatment she received as a result to the incident at the salon in April 2010. She never has any joint inflammation or lesions anywhere on her body up to this point, and after the incident that occurred on April 2010 is when she began to experience these problems.

3. Has the treatment Tracy Sales received for her incident-related injuries proximately resulting for the April 19, 2010, incident been reasonable and necessary?

Yes, in my medical opinion I believe she has received treatment for her incident related injuries that has been both reasonable and necessary.

4. Are the costs for the treatment Ms. Sales has received for her incident-related injuries proximately resulting for April 19, 2010 incident reasonable and in accordance with rates charged in your profession for similar services?

Yes, I am a board certified member of American Medical Podiatric Association, Idaho Podiatric Medical Association, and am providers for Blue Cross and Blue Shield and most other insurance related companies, and I am within the cost of most other doctors in my profession.

5. What is your prognosis with respect to Tracy sales' foot injuries and/or conditions?

Note that we did go on to find osteomyelitis in her foot after doing an MRI. The bone scan was positive and then the MRI was done and was positive. We had to go in and removed a portion of the joint of the bone and sent that tissue in and they were never able to isolate what the infectious process was. We determined once again that it was mycobacteria.

6. What is the nature and extent of any incident-related limitations, restrictions, or impairments, as well as applicable dates or time periods of such limitations, restrictions, or impairments as it pertains to Tracy Sales?

Fellow American College of Foot Surgeons
Diplomate American Board of Podiatric Surgery
Member American Podiatric Medical Association

JEFFREY L. CHANDLER, D.P.M., P.A.

Ankle & Foot Center

We explained to Ms. Sales that if this continues we might need to fuse her joint to eliminate the infectious process by cutting out the infected joint and then fusing it together, however, after her surgery in which we removed a portion of the joint, the infectious process appears to have subsided. She does still occasionally have some pain with her toe but not to the extent it was prior to the intervention and removing that portion of that joint.

7. What additional treatments, if any, do you recommend for Tracy Sales at this time?

It was explained to her we could fuse the joint, but the fusion was not necessary if the pain was not significant to need such treatment.

8. What is the nature, extent, and reasonable cost estimate of any future medical treatment and/or procedures that Tracy Sales will need as a proximate result of her incident-related injuries sustained because the April 19, 2010, incident?

If she has to have a fusion of the Inter Phalangeal Joint (IPJ) the cost for code 28760 for the doctors' fees would be \$1,604.00 and for the surgery center would be \$1,734.00; hardware would be between \$200-\$400.

9. Any other observations or medical opinions that may have related to the injuries, medical complaints, limitations, on-going impairments, and future medical treatment Tracy Sales has received or will received for her incident-related injuries proximately resulting from the April 19, 2010, incident?

Not at this time.

10. What documentation have you reviewed in formulating your opinions and responses to the above questions?

In addition to copies of the bone scan, MRI, x-rays, pertinent medical records and billing were all reviewed.

11. What are your credentials, licenses, specialties, and professional associations or attainments?

I graduated from medical school in 1974 in San Francisco and did my residency at Beach Community Hospital. I taught 3 years at UCUA Medical Center. I was board certified in 1980 from the American Board of Podiatric Surgery, also received my Ankle and Foot Medical Board of Podiatric Surgery, was a National Honor Society Member, and in the top 5 in class in medical school.

To:

2012-03-08 14:14 Ankle and Foot

From:

2083444349 >>

5-23-13 11:06am p. 8 of 8

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P 6/6

Fellow American College of Foot Surgeons
Diplomate American Board of Podiatric Surgery
Member American Podiatric Medical Association

JEFFREY L. CHANDLER, D.P.M., P.A.

Ankle & Foot Center

12. What professional publications, articles, or other similar writings have you authored or co-authored within that last ten years?

I have not written any articles.

13. What is your compensation for providing your expert opinions in this action?

Approx. \$500.00, if we have to go to court it will be more than that.



Jeffrey Chandler

MAY 30 2013

CHRISTOPHER D. RICH, Clerk
By CHARTY ABBOTT
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRACY SALES, individually,

Plaintiff,

vs.

STACIE PEABODY, individually and doing
business under the assumed name of
FINGERPRINTS DAY SPA; and LINDA
COOK, individually,

Defendants.

Case No. CVPI 1206516

ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT
ON COUNT II OF THE COMPLAINT

COURT APPEARANCES ON MAY 28, 2013

James F. Jacobson appeared on behalf of Plaintiff Tracy Sales. Tracy L. Wright appeared on behalf of Defendants Stacie Peabody and Fingerprints Day Spa.

I. NATURE OF THE CASE

Plaintiff alleges that her toe was injured during a pedicure performed at Fingerprints Day Spa. This matter is before the Court on a motion for summary judgment, brought by two of the three named Defendants.¹

¹ Defendants Peabody and Fingerprints Day Spa move for summary judgment. These two defendants will be referred to throughout this order as "Defendants." Defendant Linda Cook does not join in the motion for summary judgment and did not appear at the hearing.

II. BACKGROUND

On April 10, 2012, Plaintiff Sales filed a complaint against Defendants Stacie Peabody, Fingerprints Day Spa, and Linda Cook. Plaintiff Sales alleged that her toe was injured during a pedicure performed by Linda Cook at Fingerprints Day Spa, which was owned by Defendant Peabody at the time. Plaintiff claimed that the injury became infected and required numerous treatments and procedures, including surgery.

Plaintiff's Complaint was based on two separate theories of liability. In Count I, Plaintiff alleged that the Defendants were negligent in failing to maintain the premises and in failing to warn her of the risks of a pedicure. In Count II, Plaintiff alleged liability under a theory of *respondeat superior* where, according to the Complaint:

Defendant Cook was acting as the agent and/or under the direction and/or control of Defendant Peabody in the performance of the pedicure; the use of equipment and tools to perform the pedicure; and the use of the facility, workspace, and other accoutrements used in the performance of the pedicure.

Complaint, paragraph 4.

Defendants moved for summary judgment on Count II, arguing that the doctrine of *respondeat superior* does not apply on the facts of this case.²

² Defendants did not move for summary judgment on count I, general negligence, a fact which Plaintiff points out in opposing the motion for summary judgment. The trial court may not decide an issue not raised in the moving party's motion for summary judgment. *Esser Elec. v. Lost River Ballistics Technologies, Inc.*, 145 Idaho 912, 919, 188 P.3d 854, 861 (2008), citing *Harwood v. Talbert*, 136 Idaho 672, 39 P.3d 612 (2001). Therefore, the court will not address any arguments on count I.

In its discretion, the Court grants Defendants leave to file a motion for summary judgment on count I. Any such motion must be filed no later than June 14, 2013 and set for hearing at the earliest date available under the Idaho Rules of Civil Procedure. All other dates contained in the November 29, 2012 scheduling order remain in effect.

III. STANDARD OF REVIEW

Summary judgment may be entered only if the pleadings, depositions and affidavits show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Idaho Rule of Civil Procedure 56(c). The evidence must be construed in favor of the party opposing the motion, and all reasonable inferences must be drawn in that party's favor. *Nava v. Rivas-Del Toro*, 151 Idaho 853, 857, 264 P.3d 960, 964 (2011) (citation omitted). In other words, the moving party bears the burden of proving the absence of material facts. *Harwood v. Talbert*, 136 Idaho 672, 677, 39 P.3d 612, 617 (2001).

IV. ISSUE

Whether facts exist under which Defendants could be vicariously liable for Linda Cook's allegedly tortious conduct under the doctrine of *respondeat superior*, such that summary judgment would not be appropriate?

V. APPLICABLE LAW

A. Law on Agency and *Respondeat Superior*

A principal may be vicariously liable for the tortious actions of her agent. *Sharp v. W.H. Moore, Inc.*, 118 Idaho 297, 303, 796 P.2d 506, 512 (1990); Restatement (Third) Of Agency § 2.04 (2006) ("Viewed as a doctrine within the law of agency, *respondeat superior* is a basis upon which the legal consequences of one person's acts may be attributed to another person.").

A principal-agent relationship results from "the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *Herbst v. Bothof Dairies, Inc.*, 110 Idaho 971, 973, 719

P.2d 1231, 1233 (Ct. App. 1986). The right to control, which is the defining feature of the principal-agent relationship, “may exist despite the lack of its exercise.” *Id.* Generally, the acts and conduct of the parties, rather than written contracts, demonstrate the intention to form a principal-agent relationship. See *Adkison Corp. v. Am. Bldg. Co.*, 107 Idaho 406, 409, 690 P.2d 341, 344 (1984). However, a tenant is not the agent of her landlord for any purpose unless made so by specific agreement. *Killinger v. Iest*, 91 Idaho 571, 575, 428 P.2d 490, 494 (1967) (citation omitted).

B. Law on Employment Relationships and *Respondeat Superior*

An employer may be vicariously liable for the tortious actions of an employee through the doctrine of *respondeat superior*. *Rausch v. Pocatello Lumber Co., Inc.* 135 Idaho 80, 83-84, 14 P.3d 1074, 1077-78 (Ct. App. 2000). The test in Idaho for determining whether an individual is an employee is the “right to control test.” *Sines v. Sines*, 110 Idaho 776, 777, 718 P.2d 1214, 1215 (1986). This test generally focuses upon consideration of four factors: “(1) direct evidence of the right [to control]; (2) the method of payment; (3) furnishing major items of equipment; and (4) the right to terminate the employment relationship at will and without liability.” *Id.* (quoting *Burdick v. Thornton*, 109 Idaho 869, 712 P.2d 570, 572 (1985)). “When applying the right to control test, the trier of fact must balance each of the elements present to determine their relative weight and importance, since none of the elements in itself is controlling.” *Casey v. Sevy*, 129 Idaho 13, 16, 921 P.2d 190, 193 (Ct. App. 1996) (quoting *Roman v. Horsley*, 120 Idaho 136, 137–38, 814 P.2d 36, 37–38 (1991)).

VI. DECISION

Because this case is before the Court on a motion for summary judgment, the

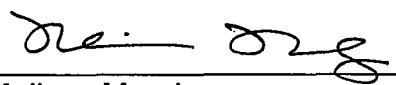
specific question is whether a genuine issue of material fact exists regarding either of the above relationships (agency/employment), which would preclude the granting of a motion for summary judgment. Construing the evidence in favor of the Plaintiff, the Court finds no such issue of material fact. Plaintiff has provided no set of facts under which Cook could possibly have been Defendants' agent or employee.

Defendant Linda Cook leased a space in the Fingerprints Day Spa from Stacie Peabody, who owned the spa. Cook paid Peabody weekly for the space. The lease payments were fixed and were not dependent upon Cook's business. Cook bought her own supplies. Cook scheduled her own appointments at times of her own choosing. Defendants had no control over when Cook worked, or even if she worked. Cook had full control over her business hours, methods of providing services, tools, and implements. Cook had full control over her sanitation procedures. Cook was not supervised by Peabody or the Fingerprints Spa.

Based upon the information before the Court, no set of facts exists under which Cook could possibly have been Defendants' agent or employee. Because Cook was neither an employee nor an agent, Defendants Peabody and Fingerprints Day Spa cannot be held vicariously liable for Cook's actions under a theory of *respondeat superior*. Therefore, Defendants' motion for summary judgment is granted as to Count II of Plaintiff's Complaint.

IT IS SO ORDERED.

DATED this 30th day of May 2013.



Melissa Moody
District Judge

CERTIFICATE OF MAILING

I hereby certify that on this 30th day of May 2013, I mailed (served) a true

and correct copy of the within instrument to:

Robert W. Jacobson
JACOBSON & JACOBSON, PLLC
660 E Franklin Rd, Ste 110
Meridian, ID 83642
bob@jjlawidaho.com

() U.S. Mail, Postage Prepaid
() Hand Delivered
(X) Electronic Mail
() Facsimile

Tracy L. Wright
CAREY PERKINS, LLP
300 N 6th St, Ste 200
PO Box 519
Boise, ID 83701-0519
tlwright@careyperkins.com

() U.S. Mail, Postage Prepaid
() Hand Delivered
(X) Electronic Mail
() Facsimile

CHRISTOPHER D. RICH
Clerk of the District Court

By: 
Deputy Court Clerk

TIME RECEIVED

June 4, 2013 9:31:35 AM MDT

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P.M.

JUN 04 2013

CHRISTOPHER D. RICH, Clerk

By JAMIE MARTIN

DEPUTY

JAMES F. JACOBSON, ISB #7011
 ROBERT W. JACOBSON, ISB # 7156
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 Email: bob@jjlawidaho.com

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL

DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRACY SALES, individually;

Plaintiff,

vs.

STACIE PEABODY, individually and doing
 business under the assumed name of
 FINGERPRINTS DAY SPA; and LINDA
 COOK, individually;

Defendants.

Case No. CV PI 1206516

AFFIDAVIT OF DOUG SCHOON

STATE OF CALIFORNIA)
) ss:
 COUNTY OF ORANGE)

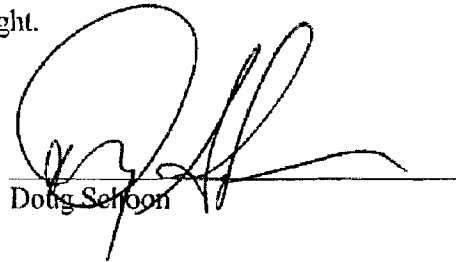
DOUG SCHOON, being first duly sworn upon oath, deposes and says:

1. That this Affidavit of Doug Schoon is submitted in support of Plaintiff's Opposition to Defendants Stacie Peabody and Fingerprints Day Spa's Motion for Summary Judgment.

2. That your Affiant is President of Schoon Scientific and Regulatory Consulting, LLC and Co-Chair Nail Manufacturers Council Professional Beauty Association.

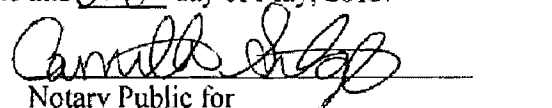
3. That attached hereto is Exhibit A, a true and correct copy of my opinion dated May 9, 2013, which contains information as to my qualifications as an expert and my opinions expressed in this action pursuant to Idaho Rules of Evidence 702-705 and as disclosed pursuant to Idaho Rules of Civil Procedure 26(b)(4).

FURTHER, your Affiant sayeth naught.


Doug Schoon

SUBSCRIBED AND SWORN to before me this 28 day of May, 2013.




Notary Public for
State of California
Residing at Dana Point, CA
My Commission expires: 3/29/2017

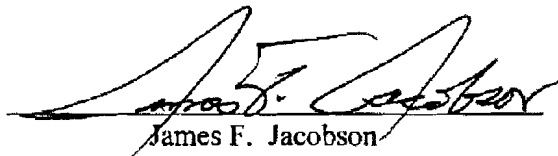
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4th day of ^{June}~~May~~, 2013, a true and correct copy of the **AFFIDAVIT OF DOUG SCHOON** was served on the following attorneys of record via method of delivery below:

David W. Knotts; Tracy L. Wright ☒ U.S. Mail, postage prepaid
Carey Perkins, LLP ☐ Hand-Delivered
Capitol Park Plaza ☐ Overnight Mail
300 N. 6th Street, Ste. 200 ☐ Facsimile (208) 345-8660
P. O. Box 519
Boise, ID 83701
*Attorneys for Defendant, Stacie Peabody
and Fingerprints Day Spa*

Jeffrey P. Heineman ☒ U.S. Mail, postage prepaid
Heineman Law Office ☐ Hand-Delivered
1501 Tyrell Lane ☐ Overnight Mail
Boise, ID 83706 ☐ Facsimile (208) 947-9009
Attorney for Defendant, Linda Cook

Margalit Z. Ryan ☒ U.S. Mail, postage prepaid
Bauer & French ☐ Hand-Delivered
P. O. Box 2730 ☐ Overnight Mail
Boise, ID 83701 ☐ Facsimile (208) 383-0412
Attorney for Defendant, Linda Cook


James F. Jacobson

JUN 11 2013

CHRISTOPHER D. RICH, Clerk
By ANNAMARIE MEYER
DEPUTY

David W. Knotts, ISB No. 3627
Tracy L. Wright, ISB No. 8060
CAREY PERKINS LLP
Capitol Park Plaza
300 North 6th Street, Suite 200
P. O. Box 519
Boise, Idaho 83701
Telephone: (208) 345-8600
Facsimile: (208) 345-8660

Attorneys for Defendants .
Stacie Peabody and
Finger Prints Day Spa

ORIGINAL

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

TRACY SALES, individually,

Plaintiff,

vs.

STACIE PEABODY, individually and
doing business under the assumed name
of FINGERPRINTS DAY SPA; and
LINDA COOK, individually,

Defendants.

Case No. CV PI 1206516

DEFENDANTS STACIE PEABODY
AND FINGERPRINTS DAY SPA'S
MOTION TO STRIKE THE
DISCLOSURE OF DOUG SCHOON,
AND FOR SUMMARY JUDGMENT
RE: COUNT I - NEGLIGENCE

COME NOW Defendants Stacie Peabody and Fingerprints Day Spa
("Defendants"), by and through their counsel of record, Carey Perkins LLP, and move this
Court in limine for an order striking the disclosure of Plaintiff's expert Doug Schoon, and
excluding his testimony, on the grounds that Mr. Schoon has not demonstrated that he is
qualified to render an opinion on the matters therein, and the disclosure does not comply

DEFENDANTS STACIE PEABODY AND FINGERPRINTS DAY SPA'S MOTION TO
STRIKE THE DISCLOSURE OF DOUG SCHOON, AND FOR SUMMARY JUDGMENT
RE: COUNT I - NEGLIGENCE - 1

000109

ALB

with the requirements of Idaho Rule of Evidence 702; Defendants further object to his testimony if offered in opposition to the Motion for Summary Judgment set out below.

To the extent Plaintiff relies on the previously filed Affidavits of Doug Schoon, Jeffrey Chandler and Linda Cook (May 14, 2013) to oppose the Motion for Summary Judgment set out below, Defendants object to those Affidavits and move to strike them on the grounds they do not comply with the requirements of Idaho Rule of Civil Procedure 56(e).

Defendants further move the Court, pursuant to Rule 56 of the Idaho Rules of Civil Procedure, for summary judgment on Count I of Plaintiff's Complaint ("Negligence") on the grounds and for the reasons that there are no genuine issues of material fact and that these Defendants are entitled to judgment as a matter of law.

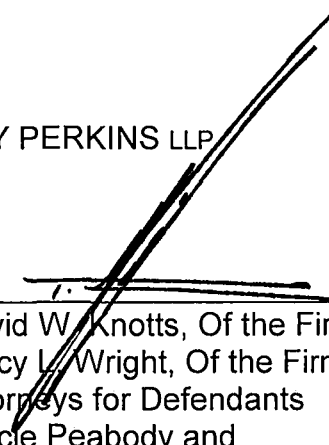
This Motion is based upon Rule 56 of the Idaho Rules of Civil Procedure, Idaho Rule of Evidence 702, the Affidavit of Linda Cook, the Affidavit of Stacie Peabody, the Memorandum in Support of Defendants' Motion to Strike the Disclosure of Doug Schoon, and For Summary Judgment, the Affidavit of Tracy L. Wright, filed contemporaneously herewith, and the files and records in the above-entitled action.

Oral argument is requested.

DATED this 11th day of June, 2013.

CAREY PERKINS LLP

By



David W. Knotts, Of the Firm
Tracy L. Wright, Of the Firm
Attorneys for Defendants
Stacie Peabody and
Finger Prints Day Spa

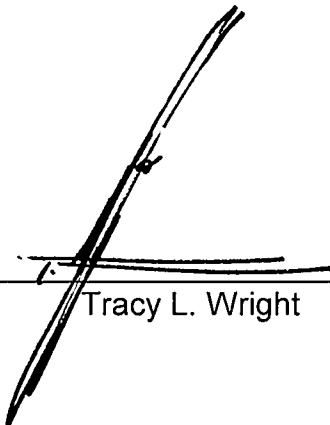
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of June, 2013, I served a true and correct copy of the foregoing DEFENDANTS STACIE PEABODY AND FINGERPRINTS DAY SPA'S MOTION TO STRIKE THE DISCLOSURE OF DOUG SCHOON, AND FOR SUMMARY JUDGMENT RE: COUNT I - NEGLIGENCE by delivering the same to each of the following, by the method indicated below, addressed as follows:

James F. Jacobson	<input checked="" type="checkbox"/>	U.S. Mail, postage prepaid
Robert W. Jacobson	<input type="checkbox"/>	Hand-Delivered
JACOBSON & JACOBSON, PLLC	<input type="checkbox"/>	Overnight Mail
660 E. Franklin Rd., Ste. 110	<input type="checkbox"/>	Facsimile (208) 477-5210
Meridian, Idaho 83642		
Telephone: (208) 884-1995		
<i>Attorneys for Plaintiff</i>		

Jeffrey P. Heineman	<input checked="" type="checkbox"/>	U.S. Mail, postage prepaid
Heineman Law Office	<input type="checkbox"/>	Hand-Delivered
1501 Tyrell Lane	<input type="checkbox"/>	Overnight Mail
Boise, Idaho 83706	<input type="checkbox"/>	Facsimile (208) 947-9009
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Margalit Z. Ryan	<input checked="" type="checkbox"/>	U.S. Mail, postage prepaid
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Tracy L. Wright

JUN 11 2013

CHRISTOPHER D. RICH, Clerk
By ANNAMARIE MEYER
DEPUTY

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Attorneys for Defendants
Stacie Peabody and
Finger Prints Day Spa

ORIGINAL

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

TRACY SALES, individually,

Plaintiff,

vs.

STACIE PEABODY, individually and
doing business under the assumed name
of FINGERPRINTS DAY SPA; and
LINDA COOK, individually,

Defendants.

Case No. CV PI 1206516

MEMORANDUM IN SUPPORT OF
DEFENDANTS STACIE PEABODY
AND FINGERPRINTS DAY SPA'S
MOTION TO STRIKE THE
DISCLOSURE OF DOUG SCHOON,
AND FOR SUMMARY JUDGMENT
RE: COUNT I - NEGLIGENCE

I. INTRODUCTION

This case involves allegations that pedicure services performed by Defendant Linda Cook on the premises of Fingerprints Day Spa allegedly resulted in injury and damages to the Plaintiff. In Count I of her Complaint, the Plaintiff alleges that Defendants

MEMORANDUM IN SUPPORT OF DEFENDANTS STACIE PEABODY AND
FINGERPRINTS DAY SPA'S MOTION TO STRIKE THE DISCLOSURE OF DOUG
SCHOON; AND FOR SUMMARY JUDGMENT RE: COUNT I - NEGLIGENCE - 1 000113

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Stacie Peabody and Fingerprints Day Spa (referred to herein collectively as "Ms. Peabody") were negligent in failing to warn Plaintiff of "potential risks involved in the pedicure procedure" and in failing to maintain the premises at Fingerprints Day Spa. However, as nothing more than a lessor of space to Defendant Linda Cook, Ms. Peabody had no duty to warn Ms. Cook's customers of "potential risks" of procedures performed solely by Ms. Cook at Plaintiff's request. The Court has granted the Defendants' Motion for [partial] Summary Judgment absolving them of any vicarious liability for the acts or omissions of Ms. Cook.

In addition, Plaintiff has not put forth any competent evidence of direct negligence on the part of Ms. Peabody. That is, the disclosure of Doug Schoon does not comply with Idaho Rule of Evidence 702, is not admissible as evidence under Idaho Rule of Civil Procedure 56(e), and should be stricken and not considered by the Court for any reason. With the exclusion of those materials, nothing in the record provides any evidence of negligence by Ms. Peabody. **In fact, regardless of what the Court considers, the Plaintiff cannot establish a causal link between the matters raised and the infection Plaintiff allegedly experienced.** Accordingly, Ms. Peabody is entitled to summary judgment in her favor

II. MATERIAL AND UNDISPUTED FACTS

At the time of the incident underlying this suit, on or around April 19, 2010, defendant Linda Cook was leasing space from Ms. Peabody. **Aff. Stacie Peabody ¶ 1**

(Mar. 27, 2013); **Aff. Linda Cook ¶ 1** (April 25, 2013).¹ At that time, Ms. Peabody owned the property which housed Fingerprints Day Spa. **Aff. Stacie Peabody ¶ 1; Aff. Linda Cook ¶ 1**. Under the lease arrangement between Ms. Cook and Ms. Peabody, Ms. Cook was obligated to bring and use her own supplies, including nail implements. **Aff. Stacie Peabody ¶ 3; Aff. Linda Cook ¶ 3**. Ms. Cook also had complete and full control over every aspect of her business, including her own sanitation procedures, **Aff. Stacie Peabody ¶ 3, 4; Aff. Linda Cook ¶ 3, 4**. Ms. Peabody cleaned and sanitized her own tools and implements, including the foot basin, before and after each customer to whom she provided pedicure services. **Aff. Tracy L. Wright Exhibit A** (Depo. Stacie Peabody 29:6 to 30:21) (June 11, 2013). However, Ms. Peabody did not provide any services to Plaintiff Tracy Sales at any time, including the date in question, April 19, 2010. **Aff. Stacie Peabody ¶ 7; Aff. Linda Cook ¶ 4**.

The first time Plaintiff presented to any medical provider with complaints regarding her toe was **more than five months after the pedicure procedure** performed by Linda Cook. **Aff. Tracy L. Wright Exhibit B** (DN010-011); **Exhibit C** (Depo. Tracy Sales 87:17-22). At that time, she reported noticing thickening and separation of the nail from the foot “[f]or the past 16 months,” i.e. long before the pedicure procedure. **Aff. Tracy L. Wright Exhibit B** (DN010-011). Plaintiff subsequently treated with numerous medical providers, who variously diagnosed the underlying problem as psoriatic arthritis (a form of arthritis affecting persons with psoriasis), onychomycosis (nail fungus), cellulitis (bacterial

¹ Ms. Cook has filed two affidavits in this matter. Unless otherwise specifically indicated, all references herein are to the April 25, 2013 affidavit.

skin infection), osteomyelitis (bone infection), paronychia (nail infection often resulting from trauma to the cuticle) and psoriatic "sausage digit" (an arthritic condition affecting one or more fingers and/or toes). **Aff. Tracy L. Wright Exhibit B** (DN045-46; DN001-003; DN006-007; DN004-005; DN008-009; GEM010-011). Whatever the problem concerning the toe is or was (there is no evidence that any definitive diagnosis ever was made), it does not seem to have resolved, but Plaintiff no longer is treating for it, and considers her condition "the new norm." **Aff. Tracy L. Wright Exhibit C** (Depo. Tracy Sales 153:2 to 157:19).

III. STANDARD OF REVIEW

Summary judgment should be granted if the Court determines that the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. **City of Idaho Falls v. Home Indemnity Co.**, 126 Idaho 604, 606, 888 P.2d 383, 385 (1995); **Bonds v. Sudweeks**, 119 Idaho 529, 541, 808 P.2d 876, 871 (1991). Idaho Rule of Civil Procedure 56(c) requires the entry of summary judgment against a non-moving party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which the party bears the burden of proof. **Navarrette v. City of Caldwell**, 130 Idaho 849, 949 P.2d 597, 599 (Ct. App. 1997), citing **State v. Shama Resources Limited Partnership**, 127 Idaho 267, 270, 899 P.2d 977, 980 (1995).

IV. ARGUMENT

A. **The Doug Schoon Disclosure Exceeds the Allowable Scope of Expert Testimony Under the Idaho Rules of Evidence, and Therefore Should Be Stricken.**

The admissibility of expert testimony is a matter within this Court's discretion. *Chapman v. Chapman*, 147 Idaho 756, 760, 215 P.3d 476, 480 (2009); *Carnell v. Barker*, 137 Idaho 322, 48 P.3d 651 (2002). Under I.R.E. 702, expert testimony may be admitted if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact that is in issue." **Idaho R. Evid. 702**. The expert's testimony must actually assist the trier of fact in determining a fact in issue in order to be admissible. *Chapman*, 147 Idaho at 760, 215 P.3d at 780. Expert opinion that merely suggests possibilities would only invite conjecture and may be properly excluded. *Elce v. State*, 110 Idaho 361, 716 P.2d 505 (1986). Further, it is improper for an "expert" to render opinions on matters of law, which would constitute an invasion of the Court's authority. See *Carnell*, 137 Idaho at 328, 48 P.3d at 657 ("Witnesses are not allowed to give opinions on questions of law."). Finally, Mr. Schoon is not qualified to render any opinion as to causation in this matter. See *Dodge-Farrar v. Am. Cleaning Servs. Co.*, 137 Idaho 838, 54 P.3d 954 (Idaho App. 2002) (finding that layperson testimony regarding the cause of a plaintiff's medical condition is not admissible)

The Schoon disclosure materials (hereinafter "Schoon report"), would not assist the trier of fact in understanding the evidence or in determining any fact in issue, as his opinions only hint at possibilities, and are based on demonstrably incorrect

assumptions and the misapplication of law. Further, the opinions espoused by Mr. Schoon invade the province of the Court, and are beyond the scope of his qualifications.

The relevant questions in this matter are: (1) did Ms. Peabody have any duty to clean the foot basin prior to the subject pedicure; (2) is there evidence that Ms. Peabody breached any duty to clean the foot basin; and, (3) is there evidence of a causal link between any failure to clean the foot basin and Plaintiff's alleged injury. Addressing each of those questions in turn, it becomes clear that Mr. Schoon does nothing to assist the trier of fact in answering them.

1. Mr. Schoon does not provide competent evidence that Ms. Peabody had any duty to clean the foot basin prior to the subject pedicure.

Mr. Schoon bases his opinion that Ms. Peabody had a duty to clean the foot basins on his interpretation of OSHA and Idaho Bureau of Occupational Licenses regulations. However, his interpretation of those provisions is both wrong and improper.

First, OSHA does not apply to Ms. Peabody, as she was not an employer, and Ms. Cook was not in any sense "employed" by her. See **CFR 29, 1910.5(a)** (providing that the OSHA standards referred to by Mr. Schoon "apply to employments performed in a workplace") (emphasis added). As this Court recently found, there is "no set of facts under which Cook could possibly have been [Ms. Peabody]'s agent or employee." **Ord. Granting Def.'s Mot. S.J. On Count II Of The Compl.** (May 30, 2013). Accordingly, OSHA regulations intended to govern workers and their employers have no bearing here.²

² Moreover, OSHA was designed to protect "workers." *Arrington v. Arrington Bros. Constr., Inc.* 116 Idaho 887, 891, 781 P.2d 224, 228 (1989). Plaintiff, the allegedly injured party, did not work at Fingerprints Day Spa. Therefore, the Plaintiff is not a member of the class of persons whom OSHA was designed to protect, and OSHA does not establish any duty owed by Ms. Peabody to Plaintiff.

Second, the Idaho Bureau of Occupational Licenses, Board of Cosmetology regulations do not place the onus on the salon owner to clean and sanitize the instruments used by other operators, as Mr. Schoon suggests. See **IDAPA 24.04.01.800.04**. The IDAPA regulations governing sanitation do not, in fact, address who among various users of “instruments” is responsible for sanitizing those instruments. The only requirement under IDAPA is that “[a]ll instruments used by operators shall be sanitized after cleaning and prior to use on each patron.” **IDAPA 24.04.01.800.04** ; see also **Idaho Code § 54-824A** (“all instruments used by persons licensed pursuant to this chapter shall, after cleaning and prior to use on each patron, be disinfected with a disinfecting agent as hospital grade or better”). Therefore, the responsibility of who cleans what instrument clearly depends upon who is using the instrument, and the responsibility falls on the user/operator.

Absent evidence of a specific agreement between Ms. Peabody and Ms. Cook requiring Ms. Peabody to sanitize instruments used by other operators (and there is no evidence of any such agreement), each individual operator was obligated under IDAPA and Idaho Code to sanitize his or her own instruments prior to use on a patron. Again, Ms. Peabody never used any instrument, including the foot basins, on Plaintiff. Therefore, she had no duty to clean the foot basin prior to the subject pedicure—that duty fell to Ms. Cook, and Mr. Schoon’s improper (and incorrect) speculation regarding the application of OSHA and IDAPA provide no evidence to the contrary.

Third, it is improper for Mr. Schoon, a purported cosmetology expert, to render an opinion regarding the application of law. ***Carnell v. Barker***, 137 Idaho 322, 328,

48 P.3d 651, 657 (2002). Mr. Schoon has not demonstrated that he is qualified to render an opinion on the proper application of law to the facts—nor that this Court needs or could rely on his opinion. Nothing in the record indicates that he is a lawyer, judge, legislator or has any familiarity with the application of law in Idaho. This Court is entirely competent to review the OSHA and IDAPA rules and regulations and determine whether and how they apply to the facts of this case. Indeed, it is for the Court to decide matters of law, and not for Mr. Schoon. *Id.* Accordingly, Mr. Schoon’s opinions regarding whether and how OSHA and IDAPA apply to Ms. Peabody’s duties as a salon owner should be stricken.

2. Mr. Schoon does not provide evidence that Ms. Peabody breached any duty to clean the foot basin.

Even assuming, for the sake of this argument only, that Ms. Peabody was required to sanitize the foot basins before anyone used them, Mr. Schoon does not provide any information that would assist the trier of fact in determining whether she breached that duty. Mr. Schoon’s opinion is based on his assessment that Ms. Peabody improperly used the Let’s Touch sanitizer in the foot basin. However, his opinions are conclusory and not well-founded, and therefore are no help to the trier of fact in determining this fact in issue. See *Chapman v. Chapman*, 147 Idaho 756, 760, 215 P.3d 476, 480 (2009).

Contrary to the sly insinuations of Mr. Schoon’s report, the Let’s Touch labeling does not limit its use to metal “instruments.” **Aff. Tracy L. Wright Exhibit D.** In fact, the labeling simply does not mention foot basins, metal or otherwise, and it cannot be said that using the Let’s Touch on non-metal instruments is “inconsistent with its labeling.” Further, Mr. Schoon’s cursory analysis of how Ms. Peabody used the product is based on a single statement by Ms. Peabody that she would “run some let’s touch through the jets.”

Counsel never asked Ms. Peabody any questions to identify what she meant by that (e.g., whether she mixed the Let's Touch per label instructions, how she ran it through the jets, etc.), whether this was an approved practice per her education and training, or whether her twenty-five years of experience had imbued her with the expertise to make that call. Mr. Schoon did not have access to any of that information, and therefore was not equipped to judge whether Ms. Peabody had used the Let's Touch product appropriately. In short, there is not enough information in the record to determine whether "run[ning] some let's touch through the jets" constitutes evidence of breach. Mr. Schoon's conclusory statement does not make it so, and is of no assistance to the trier of fact on this issue.

3. Mr. Schoon does not and cannot provide evidence of a causal link between any failure to clean the foot basin and Plaintiff's alleged injury.

Mr. Schoon is not qualified to render an opinion as to causation in this matter. See *Dodge-Farrar v. Am. Cleaning Servs. Co.*, 137 Idaho 838, 54 P.3d 954 (Idaho App. 2002) (finding that layperson testimony regarding the cause of a plaintiff's medical condition is not admissible). There is nothing in the records to suggest that Mr. Schoon is a medical doctor or otherwise qualified to opine regarding medical issues. Therefore, under Idaho law he is precluded from testifying regarding the cause of Plaintiff's injury, including rendering any opinion as to the likelihood of improper sanitation causing Plaintiff's alleged injury, as the subject matter of any such opinions is beyond his qualifications. See *id.*; *State v. Pearce*, 146 Idaho 241, 246, 192 P.3d 1065, 1070 (2008) (requiring "some demonstration that the witness has acquired, through some type of

training, education or experience, the necessary expertise and knowledge to render the proffered opinion.”); **Idaho R. Evid. 702.**

B. Ms. Peabody Had No Duty To Warn Ms. Cook’s Customers About Ms. Cook’s Services.

Ms. Peabody owed, at most, only a duty of ordinary care to the Plaintiff. See ***Stephens v. Stearns***, 106 Idaho 249, 678 P.2d 41 (1984). There is no dispute Plaintiff was an invitee of Linda Cook, and that Ms. Peabody did not perform services for Plaintiff or oversee the services provided by Ms. Cook (see First Affidavit of Linda Cook ¶ 4; Aff. Stacie Peabody ¶ 8). Further, the nature of the relationship between Ms. Peabody and Ms. Cook has been attested to by each of those parties (and confirmed by this Court), which relationship amounted to lessor-lessee. Defense counsel is unaware of any authority that would impose a duty upon a property owner to warn her tenant’s customers about the potential dangers, if any, of her tenant’s services under these circumstances. Accordingly, there is no basis for Plaintiff’s “duty to warn” claim, and the same should be dismissed.

C. There Is No Evidence In The Record That Ms. Peabody Breached Any Duty, Or That Plaintiff’s Alleged Injuries Are Causally Related To Anything Ms. Peabody Did Or Failed To Do.

1. There is no evidence that Ms. Peabody breached any duty.

Ms. Peabody’s un rebutted testimony demonstrates that she took every reasonable precaution to ensure the pedicure stations, including the attached foot basins, were appropriately cleaned and sanitized. For instance, Ms. Peabody testified as follows regarding her cleaning and sanitation procedures:

Q: You were responsible for the cleaning and sanitation of the equipment at the salon back in 2010; is that right?

MR. WRIGHT: Object to the form. Misstates prior testimony.

Q: (BY MR. JACOBSON) Go ahead and answer if you can.

A: I am responsible for when I use the pedicure stations or any other thing in the salon, that I don't rely on the last person, who should have cleaned and sanitized it. I take my own initiative and sanitize it again before my personal clients.

[. . .]

Q: What was your procedure or protocol for cleaning and sanitizing the equipment that you used at the salon back in 2010?

A: Well, I would clean the pedicure chair, whether it looked clean or not. And I would run some Let's Touch through the jets. And all my implements were always soaked in Barbicide or put in the autoclave before and after every client.

Q: So you went through that cleaning routine before and after

—

A. Correct.

Aff. Tracy L. Wright Exhibit A (Depo. Stacie Peabody 28:24 to 29:25). Those actions go above and beyond the applicable requirements of Idaho Code § 54-824A, which requires that each individual licensee sanitize his or her implements "prior to use on each patron." Obviously, it would be improper (and prohibited by statute) for anyone licensed pursuant to Idaho Code Title 54, Chapter 8 (such as Ms. Peabody and Ms. Cook) to rely on the cleaning/sanitation practices of someone else, yet that is the premise on which Plaintiff's argument rests: that Ms. Cook relied on Ms. Peabody to sanitize the foot basins for her. Plaintiff's argument is absurd on its face, and contrary to the Idaho Code requirements.

Further, the evidence in the record affirmatively demonstrates Ms. Peabody's excellent cleaning and sanitation practices. For instance, the Bureau of Occupational

Licenses inspection records indicate that Ms. Peabody received an "A" rating each and every time she and Fingerprints Day Spa were inspected. See **Aff. Tracy L. Wright Exhibit E**. An "unacceptable condition" is denoted by a "C" rating. Thus, Ms. Peabody passed all inspections with flying colors, demonstrating her commitment to, and compliance with, appropriate cleaning and sanitation practices.

2. There is no evidence that Plaintiff's alleged injury is causally related to anything Ms. Peabody did or failed to do.

Plaintiff cannot possibly establish proximate cause. Plaintiff alleges that "[d]uring the pedicure Plaintiff's right toe was punctured or otherwise injured by an instrument or instruments being used to perform the pedicure. Defendant Linda Cook performed the pedicure on the date of the incident at Defendant Peabody's facility." **Plf.'s Compl. ¶ VII** (emphasis added). In other words, Plaintiff alleges that the injury, if any, resulted from Ms. Cook's actions. Thus, even if Ms. Peabody had any responsibility for cleaning the foot basins for the lessees (which Ms. Peabody denies), there is no evidence in the record that she failed to do so, or that failing to do so caused any injury to Plaintiff. There is not even evidence that the foot basin used on Plaintiff was unclear! Beyond pure speculation, it is difficult to conceive how any link between Ms. Peabody's actions (or inactions) and Plaintiff's alleged injuries could be established. To date, Plaintiff certainly has failed to put forth any evidence of such a link. This failure is determinative and fatal to Plaintiff's action. ***McPheters v. Maile***, 138 Idaho 391, 396, 64 P.3d 317, 322 (2003)(finding summary judgment was proper where the Plaintiff failed to provide any evidence of causation).

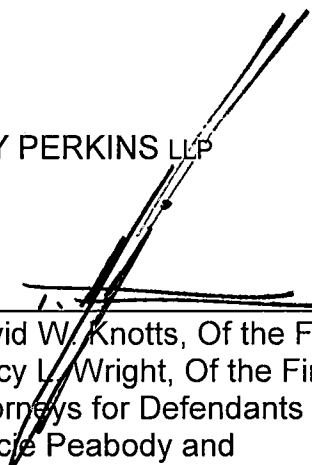
**V.
CONCLUSION**

Based on the foregoing, Ms. Peabody respectfully requests that the Court strike the disclosure and opinions of Doug Schoon. Ms. Peabody further requests that the Court grant the instant Motion for Summary Judgment and dismiss all of the Plaintiff's claims.

DATED this 11th day of June, 2013.

CAREY PERKINS LLP

By



David W. Knotts, Of the Firm
Tracy L. Wright, Of the Firm
Attorneys for Defendants
Stacie Peabody and
Finger Prints Day Spa

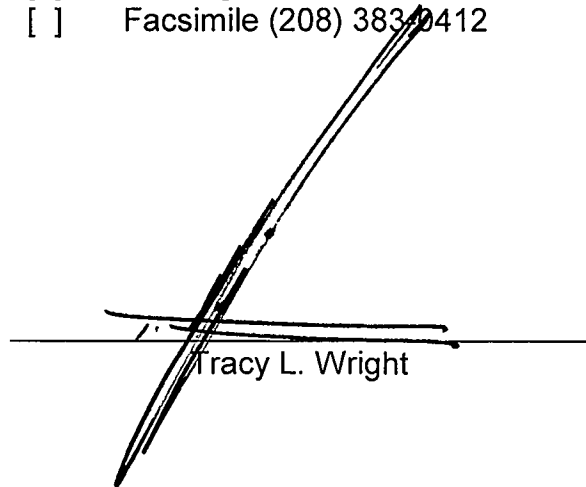
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of June, 2013, I served a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF DEFENDANTS STACIE PEABODY AND FINGERPRINTS DAY SPA'S MOTION TO STRIKE THE DISCLOSURE OF DOUG SCHOON, AND FOR SUMMARY JUDGMENT RE: COUNT I - NEGLIGENCE by delivering the same to each of the following, by the method indicated below, addressed as follows:

James F. Jacobson	<input checked="" type="checkbox"/>	U.S. Mail, postage prepaid
Robert W. Jacobson	<input type="checkbox"/>	Hand-Delivered
JACOBSON & JACOBSON, PLLC	<input type="checkbox"/>	Overnight Mail
660 E. Franklin Rd., Ste. 110	<input type="checkbox"/>	Facsimile (208) 477-5210
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Telephone: (208) 884-1995		
<i>Attorneys for Plaintiff</i>		

Jeffrey P. Heineman	<input checked="" type="checkbox"/>	U.S. Mail, postage prepaid
Heineman Law Office	<input type="checkbox"/>	Hand-Delivered
1501 Tyrell Lane	<input type="checkbox"/>	Overnight Mail
Boise, Idaho 83706	<input type="checkbox"/>	Facsimile (208) 947-9009
Telephone: (208) 343-5687		
<i>Attorneys for Defendant Cook</i>		

Margalit Z. Ryan	<input checked="" type="checkbox"/>	U.S. Mail, postage prepaid
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Attorneys for Defendants
Stacie Peabody and
Finger Prints Day Spa

NO. _____ FILED _____
A.M. _____ P.M. 445

JUN 11 2013

CHRISTOPHER D. RICH, Clerk
By ANNAMARIE MEYER
DEPUTY

ORIGINAL

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

TRACY SALES, individually,

Plaintiff,

vs.

STACIE PEABODY, individually and
doing business under the assumed name
of FINGERPRINTS DAY SPA; and
LINDA COOK, individually,

Defendants.

Case No. CV PI 1206516

AFFIDAVIT OF TRACY L. WRIGHT

STATE OF IDAHO)
 : ss.
County of Ada)

Tracy L. Wright, having been first duly sworn upon oath, deposes and says:

1. I am a member of the law firm of Carey Perkins LLP, attorneys of

record for Defendants Stacie Peabody and Fingerprints Day Spa in the above-captioned action, and the following statements are made of my own personal knowledge and are true and correct.

2. Attached hereto as Exhibit A is a true and correct copy of the Deposition Transcript of Stacie Peabody;

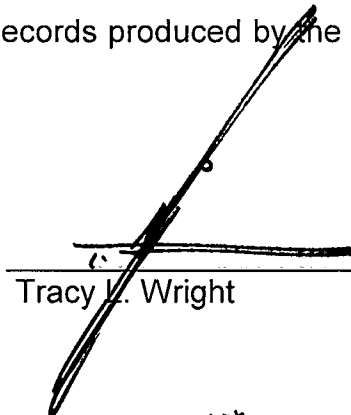
3. Attached hereto as Exhibit B are true and correct copies of relevant medical records of the Plaintiff, Tracy Sales;

4. Attached hereto as Exhibit C is a true and correct copy of the Deposition Transcript of Tracy Sales;

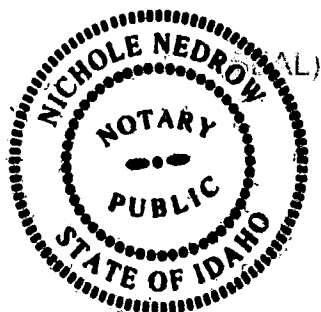
5. Attached hereto as Exhibit D is a true and correct copy of the "Let's Touch" product label, which I retrieved from the product's website; and


6. Attached hereto as Exhibit E is a true and correct copy of the Idaho Bureau of Occupational Licenses Inspection Records produced by the Idaho Bureau of Occupational Licenses pursuant to subpoena.

FURTHER your Affiant saith not.


Tracy L. Wright

SUBSCRIBED AND SWORN to before me this 1st day of June, 2013.




Notary Public for Idaho
Residing at Boise, Idaho
My Commission expires 10/5/2015

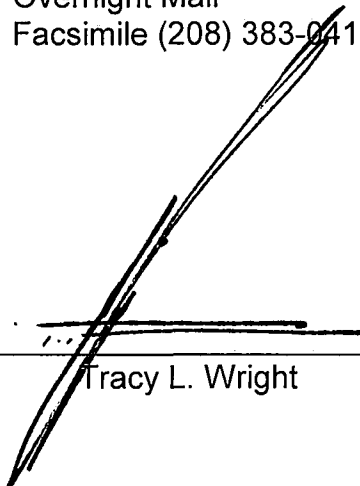
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of June, 2013, I served a true and correct copy of the foregoing AFFIDAVIT OF TRACY L. WRIGHT by delivering the same to each of the following, by the method indicated below, addressed as follows:

James F. Jacobson	<input checked="" type="checkbox"/>	U.S. Mail, postage prepaid
Robert W. Jacobson	<input type="checkbox"/>	Hand-Delivered
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Boise, Idaho 83701-2730		
Telephone: (208) 383-0090		
<i>Attorneys for Defendant Cook</i>		



Tracy L. Wright

EXHIBIT A

000130

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRACY SALES, individually,)
 Plaintiff,)
 vs.) Case No. CV PI 1206516
STACIE PEABODY, individually)
and doing business under the)
assumed name of FINGERPRINTS)
DAY SPA; and LINDA COOK,)
individually;)
 Defendants.)

DEPOSITION OF STACIE PEABODY
MARCH 27, 2013

REPORTED BY:
EMILY L. NORD, CSR No. 695, RPR
Notary Public

1 THE DEPOSITION OF STACIE PEABODY was taken on
2 behalf of the Plaintiff at the offices of Carey Perkins,
3 LLP, Capitol Park Plaza, 300 N. 6th Street, Suite 200,
4 Boise, Idaho, commencing at 9:11 a.m. on Wednesday,
5 March 27, 2013, before Emily L. Nord, Certified
6 Shorthand Reporter and Notary Public within and for the
7 State of Idaho, in the above-entitled matter.

8
9 A P P E A R A N C E S

10
11 For the Plaintiff Tracy Sales:

12 Jacobson & Jacobson, PLLC

13 BY MR. JAMES F. JACOBSON

14 660 E. Franklin Road, Suite 110

15 Meridian, ID 83642

16
17 For the Defendant Stacie Peabody and Fingerprints Day Spa:

18 Carey Perkins, LLP

19 BY MR. TRACY L. WRIGHT

20 Capitol Park Plaza

21 300 N. 6th Street, Suite 200

22 P.O. Box 519

23 Boise, ID 83701

24
25 Also Present: Tracy Sales; Marc Bybee, intern

I N D E X

TESTIMONY OF STACIE PEABODY

PAGE

Examination by Mr. Jacobson

4

E X H I B I T S

(No exhibits were marked.)

<p>1 STACIE PEABODY, 2 first duly sworn to tell the truth relating to said 3 cause, testified as follows: 4 5 MR. JACOBSON: Let the record reflect this is 6 the time and place pursuant to notice for the taking of 7 the deposition of Stacie Peabody, pursuant to the Idaho 8 Rules of Civil Procedure. 9 10 EXAMINATION 11 QUESTIONS BY MR. JACOBSON: 12 Q. Ms. Peabody, have you ever had your deposition 13 taken before? 14 A. No, sir. 15 Q. I am sure that your attorney has oriented you, 16 to some degree, as to what this process is going to be 17 like. Let me go over -- which is a very basic, standard 18 thing -- some rules and procedures that will help to 19 make this process as smooth as possible. 20 During the course of the deposition, the court 21 reporter will be taking down what we say, my questions 22 and your answers to those. 23 A. Okay. 24 Q. If there is a question that you don't 25 understand, if you would let me know, and then I can [Page 4]</p>	<p>1 Q. And Fingerprints Day Spa is actually an 2 assumed business name or a DBA; right? 3 A. Yes. 4 Q. And, really, the business is you; you're the 5 owner of the business? 6 A. Yes. 7 Q. And you have not incorporated the business at 8 any time, have you? 9 A. It is incorporated. 10 Q. It is incorporated now? 11 A. It's always been incorporated. 12 Q. When you say "incorporated," what do you 13 understand that to mean? 14 A. Tax breaks. 15 Q. So the business gets tax breaks? 16 A. Yes. 17 Q. Okay. But in terms of a filing with the 18 Secretary of State for the State of Idaho, the only 19 filing has been the assumed business name; right? 20 A. Well, I go by "Fingerprints, Inc." 21 Q. You go by "Fingerprints, Inc."? 22 A. Yeah. That's what -- yes. 23 Q. Okay. That's the assumed business name that 24 you're saying is filed with the Secretary of State? 25 A. I'm not sure. That's what it says on my [Page 6]</p>
<p>1 either restate or rephrase or repeat the question in a 2 way that helps you to better understand that. Is that 3 okay? 4 A. Absolutely. 5 Q. In responding to my questions, you'll want to 6 use audible words, such as yes and no, as opposed to 7 sounds or gestures; which, while we typically use those 8 when we converse, are very difficult for the court 9 reporter to take down or create a record that's unclear. 10 Is that okay? 11 A. Yes. 12 Q. If at any time you need to take a break, 13 that's fine, and we can do that. If I have asked a 14 question, then you'll need to answer that question 15 before we take the break. Do you understand? 16 A. Yes. 17 Q. Great. And then is there anything today that 18 would prohibit or inhibit you from giving complete and 19 accurate answers in your deposition today? 20 A. No. 21 Q. All right. With that, then, we'll go ahead 22 and proceed. 23 My understanding is that you're the owner of a 24 business called Fingerprints Day Spa; is that correct? 25 A. Yes. [Page 5]</p>	<p>1 checkbook. 2 Q. All right. Anything else that you've done, by 3 way of filings with the Secretary of State, besides the 4 assumed business name? 5 A. No. 6 Q. How long have you owned this business, 7 Fingerprints Day Spa? 8 A. Probably about 25 years. 9 Q. And during that period, has the business been 10 located only in Boise, or has it been located other 11 places? 12 A. Boise. 13 Q. And you've been the only owner of the business 14 throughout that period; is that right? 15 A. Yes. 16 Q. And what is it that Fingerprints Day Spa does? 17 What services or products do they provide to people? 18 A. It's varied over the years. 19 Q. In the last five years, what has it been like? 20 A. We have had nail technicians, hairdressers, 21 and estheticians and massage therapists. 22 Q. You said one word that I don't recognize. 23 A. Esthetician? 24 Q. Esthetician. Could you -- 25 A. Skin care -- [Page 7]</p>

<p>1 Q. -- spell that?</p> <p>2 A. No. Can you?</p> <p>3 Q. I'm just trying to help Madam Court Reporter</p> <p>4 by having you spell that.</p> <p>5 A. We can just say "professional skin care."</p> <p>6 Q. And that's what an esthetician is?</p> <p>7 A. Esthetician, correct.</p> <p>8 Q. Okay. And so those are the services that</p> <p>9 Fingerprints has provided over the last five years?</p> <p>10 A. Yes.</p> <p>11 Q. What does an esthetician do?</p> <p>12 A. Skin care.</p> <p>13 Q. I mean more specifically. You said</p> <p>14 "professional skin care." What specifically do they do?</p> <p>15 A. Well, I'm not exactly sure. I'm not an</p> <p>16 esthetician.</p> <p>17 Q. What is your training and background with</p> <p>18 respect to --</p> <p>19 A. I'm a nail technician.</p> <p>20 Q. Is there a licensure that you have to get in</p> <p>21 order to be a nail technician in Idaho?</p> <p>22 A. Yes.</p> <p>23 Q. What is that licensure process?</p> <p>24 A. Going to school, getting an education, passing</p> <p>25 the State test, and staying current in your license.</p> <p style="text-align: right;">[Page 8]</p>	<p>1 Q. Is it still located at that same place?</p> <p>2 A. No, it is not.</p> <p>3 Q. Where has it moved to now?</p> <p>4 A. The salon is closed, and has been for two</p> <p>5 years.</p> <p>6 Q. Do you remember approximately the date that</p> <p>7 the salon closed?</p> <p>8 A. I'm sorry, I don't.</p> <p>9 Q. Just approximately, month and year.</p> <p>10 A. Maybe March 2010. Maybe. I think it's been</p> <p>11 two years now.</p> <p>12 Q. Okay. That would be March of 2011, two years</p> <p>13 ago?</p> <p>14 A. Yeah.</p> <p>15 Q. Is that correct?</p> <p>16 A. '11, yeah. It's '13. Sorry.</p> <p>17 Q. That's okay.</p> <p>18 A. I'm still a year off.</p> <p>19 Q. That's okay.</p> <p>20 A. It's the time change.</p> <p>21 Q. Me too. Me too.</p> <p>22 What aspect of Fingerprints is still open?</p> <p>23 What services are you providing now?</p> <p>24 A. I do manicuring and pedicuring services at my</p> <p>25 home, where my name has still followed me, Fingerprints.</p> <p style="text-align: right;">[Page 10]</p>
<p>1 Q. What do you have to do to stay current in your</p> <p>2 license?</p> <p>3 A. Pay your fees.</p> <p>4 Q. Any education requirements?</p> <p>5 A. No.</p> <p>6 Q. Just simply paying the fee to the State?</p> <p>7 A. Paying the fee to the State.</p> <p>8 Q. Do any of the other services that Fingerprints</p> <p>9 has offered, those that you listed off, do they require</p> <p>10 State licensure beyond being a nail technician?</p> <p>11 A. Absolutely.</p> <p>12 Q. Which ones require licensure?</p> <p>13 A. To be an esthetician, it requires a license.</p> <p>14 To be a cosmetologist requires a license.</p> <p>15 Massage therapy does not require a license;</p> <p>16 however, I've never leased to anyone that did not have a</p> <p>17 license. So I ask that my massage therapists also be</p> <p>18 licensed. But that is not a requirement of the State of</p> <p>19 Idaho.</p> <p>20 Q. But the State has a licensure process for</p> <p>21 massage therapy even though it is not required?</p> <p>22 A. Yes, it does.</p> <p>23 Q. Okay. Where was the business located,</p> <p>24 Fingerprints Day Spa's business located back in 2010?</p> <p>25 A. 1414 Broadway Avenue.</p> <p style="text-align: right;">[Page 9]</p>	<p>1 Q. And is there anybody else that offers services</p> <p>2 there at your home now?</p> <p>3 A. No. And it's not my home. I have a salon</p> <p>4 established, that's licensed and inspected by the State</p> <p>5 every year, behind my house. So it has a separate</p> <p>6 entrance and all that. It's just located where my home</p> <p>7 is.</p> <p>8 Q. Is it a completely separate structure from</p> <p>9 your home?</p> <p>10 A. No.</p> <p>11 Q. It is attached, but it's got a separate</p> <p>12 entrance?</p> <p>13 A. A separate entrance. And complies with all of</p> <p>14 the State regulations for a home salon.</p> <p>15 Q. Back in 2010, when Fingerprints was located at</p> <p>16 the other location that you referenced, could you</p> <p>17 describe for me the layout of the salon? And if it</p> <p>18 would help, I can have you draw it.</p> <p>19 A. Oh. Well, it was pretty basic. There were</p> <p>20 three hair stations, and three to four nail stations,</p> <p>21 and three treatment rooms downstairs.</p> <p>22 Q. What is a hair station? When you say "hair</p> <p>23 station," what did that entail?</p> <p>24 A. A sink, shelving for storage of products, and</p> <p>25 the chair.</p> <p style="text-align: right;">[Page 11]</p>

1 Q. And the chair for the hair station, was it
2 just an ordinary chair like what you're sitting in now,
3 or did it have any special features to it?
4 A. It would be just like the chair you sit in
5 when you get your hair cut. I'm sure you've been to a
6 salon.
7 Q. A long time ago. As you can see by my
8 haircut, it's not complicated.
9 A. Your wife does a good job.
10 Q. Thank you. Thank you. I don't look as sharp
11 as Tracy does.
12 Now, what about a nail station; what goes into
13 a nail station?
14 A. I leased out vented nail tables, a chair, a
15 stand, and a phone that goes on the stand, and pedicure
16 chairs.
17 Q. What is a vented nail station? Describe for
18 me what that looks like and what it does.
19 A. It looks like a desk with drawers that pulls
20 nail dust down so it's not, you know, in the client's
21 face.
22 Q. Any other special features?
23 A. No.
24 Q. What about this pedicure station that you just
25 described; describe that for me in more detail. What

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1 features does it have?
2 A. A massage chair that has a foot basin.
3 Q. A massage chair with a foot basin?
4 A. Correct.
5 Q. And what's the purpose of this foot basin?
6 A. For doing pedicures.
7 Q. Would people put their feet into the basin?
8 Is that how that works?
9 A. Uh-huh. Yes.
10 Q. And I know that some of my questions may seem
11 a little, kind of, simplistic in nature, but it's just
12 to help me understand and to create a record to describe
13 this.
14 How big would these foot basins be?
15 A. Oh, two feet by three feet, I believe.
16 Q. And was it just an empty basin, or was it
17 filled with something?
18 A. Well, it was an empty basin until we filled it
19 with water, and then it was filled with water.
20 Q. And where would the water come from?
21 A. The faucet.
22 Q. When you say "the faucet," would someone take
23 a bucket, put it under a faucet somewhere, and then dump
24 it into the basin? Is that how that worked?
25 A. No. They're professional chairs. They have

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1 running water drains, the whole nine yards, jets, all
2 that.
3 Q. Okay. And all of that is part of this basin?
4 A. Correct.
5 Q. And how many of these pedicure stations did
6 you have back in 2010?
7 A. Two.
8 Q. Two. Now, all of this equipment that you have
9 just described that was part of the salon back in 2010,
10 you owned all of this equipment; is that right?
11 A. Yes.
12 Q. Do you recall the manufacturer's name as to
13 these pedicure stations?
14 A. Swan.
15 Q. And did they manufacture the full station, or
16 did they manufacture only part of it?
17 A. No, it's a one-unit.
18 Q. How would you describe yourself as a business
19 owner? Would you say you were hands-on or hands-off?
20 MR. WRIGHT: Object to the form.
21 You can answer.
22 THE WITNESS: In what regard are you talking
23 about? I am unclear as to the question.
24 Q. (BY MR. JACOBSON) Sure. As a business owner,
25 did you want to be involved in the day-to-day details of

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1 the business, or were you someone that said, look, I'm
2 just -- I'm looking at the big picture?
3 A. No --
4 MR. WRIGHT: Object to the form.
5 THE WITNESS: I can answer it.
6 I attended to my own clients. I have my own
7 clients. I answer my own phone calls. I take care of
8 my clients. That's what I did, on a daily business, as
9 I went to work to service my clientele, people that were
10 on my appointment book.
11 Q. (BY MR. JACOBSON) So if I'm understanding you
12 right, if they weren't your clients, they weren't your
13 appointment, you weren't concerned about what was
14 going --
15 A. No.
16 Q. -- on?
17 You said that you had licensure as a nail
18 technician; is that right?
19 A. Correct.
20 Q. And is that exclusively what you did, or did
21 you do anything else?
22 A. That's all I did.
23 Q. And so you weren't involved in any of these
24 pedicure stations, as far as you working? Or were you?
25 A. No. I was, if my client sat in the chair and

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<p>1 I was personally doing the service. That's when I was 2 involved in a pedicure. If it was myself, working on my 3 client.</p> <p>4 Q. Tell me about your daily routine, then, back 5 in 2010. How would a typical day go for you?</p> <p>6 A. Well, I would get up, brush my teeth, get 7 dressed for work, take my kids to school, go to work, 8 check the phone, return calls that pertained to me 9 personally, and worked on my clients, and went home.</p> <p>10 Q. About when would you get to work?</p> <p>11 A. It depended. Usually around 8:00 or 9:00.</p> <p>12 Q. And how long would you be there during the 13 day?</p> <p>14 A. It depended. However long my appointments 15 lasted.</p> <p>16 Q. What was a typical day?</p> <p>17 A. 8:00 to 5:00, or 6:00, or 7:00. It depended.</p> <p>18 Q. Depended on what appointments that you had?</p> <p>19 A. Correct.</p> <p>20 Q. How frequently would you try to schedule 21 appointments, then?</p> <p>22 A. Every hour on the hour.</p> <p>23 Q. And how long would it take you, typically, to 24 service an appointment?</p> <p>25 A. It would depend on the appointment.</p> <p style="text-align: right;">[Page 16]</p>	<p>1 Q. Was it at the beginning of the year or the end 2 of the year?</p> <p>3 A. I think the beginning.</p> <p>4 Q. And how much time did you miss as a result of 5 the surgery?</p> <p>6 A. Again, I'm unclear why this line of 7 questioning is happening.</p> <p>8 Q. That's okay. Just if you know the answer, you 9 can answer it.</p> <p>10 A. Well, it would depend, you know. I think at 11 one point I missed three to four months of work.</p> <p>12 Q. Is that three to four months straight?</p> <p>13 A. Correct.</p> <p>14 Q. And this was toward the beginning of 2010; am 15 I right?</p> <p>16 A. I believe so.</p> <p>17 Q. Okay. But you're not sure exactly when the 18 surgery took place?</p> <p>19 A. I've had my arm rebuilt four times, so it's a 20 lot to keep track of.</p> <p>21 Q. Aside from this, you know, three- to 22 four-month period in which you missed because of 23 surgery, were there regular days in which you were not 24 in the salon? And this is, again, in 2010.</p> <p>25 A. Again, I'm unclear why that would matter.</p> <p style="text-align: right;">[Page 18]</p>
<p>1 Q. Typically?</p> <p>2 A. An hour.</p> <p>3 Q. So you tried to space them an hour apart, and 4 it would typically take you an hour, then, to service?</p> <p>5 A. Yes.</p> <p>6 Q. How often were you not there? And this is, 7 again, back in 2010, approximately. Did you have 8 regular intervals where you weren't at the salon?</p> <p>9 A. Yes.</p> <p>10 Q. How often would those occur? What were those 11 intervals?</p> <p>12 A. Well, I was in a car accident, and there were 13 times that I was not in the shop for a month or two or 14 three.</p> <p>15 Q. You were in an automobile accident in --</p> <p>16 A. Correct.</p> <p>17 Q. -- 2010?</p> <p>18 A. Correct.</p> <p>19 Q. When were you in this --</p> <p>20 A. No, it was not in 2010. I was just having a 21 surgery as a result from a car accident.</p> <p>22 Q. When did you have your surgery in 2010?</p> <p>23 A. Oh, I don't know the exact date.</p> <p>24 Q. Approximately, month?</p> <p>25 A. Again, I don't know.</p> <p style="text-align: right;">[Page 17]</p>	<p>1 Q. I appreciate your concern. It's just a matter 2 of, if you don't know the answer to my question, then I 3 need you to answer it.</p> <p>4 A. Could you please state it again.</p> <p>5 Q. Sure. In 2010, were there regular days that 6 you were not in the salon?</p> <p>7 A. I've already answered that.</p> <p>8 Q. I don't believe you have.</p> <p>9 A. Okay. I can't tell you the exact days that I 10 went to work and didn't go to work in 2010. There was a 11 period of time I missed work because of a surgery. But 12 I don't have the exact dates. I'm sorry.</p> <p>13 Q. You keep an appointment book for your clients; 14 correct?</p> <p>15 A. Correct. But I did not bring my appointment 16 book for 2010.</p> <p>17 Q. You have an appointment book for 2010; is that 18 right?</p> <p>19 A. I'm not sure that I do.</p> <p>20 Q. Okay. If you do have an appointment book for 21 2010, if you would provide that to your counsel so that 22 he can produce that.</p> <p>23 Now, you had other individuals that were 24 working as part of the business in April of 2010; right?</p> <p>25 MR. WRIGHT: Object --</p> <p style="text-align: right;">[Page 19]</p>

[7] (Pages 16 to 19)

1 Q. (BY MR. JACOBSON) Other people that performed
2 services --
3 A. Wait a second. We need to get clear on
4 something here. You keep saying working as part of my
5 business. I had no one working as part of my business.
6 I was the business Fingerprints. I had other people
7 owning and operating and performing their own business
8 inside of mine.
9 So my business is my business. Everyone
10 else's business was everyone else's business. But you
11 keep trying to put it all together.
12 Q. Well, we're going to get clear about that;
13 okay?
14 A. Okay.
15 Q. Why don't you tell me who else was performing
16 services at the salon in April of 2010.
17 A. Let's see. I believe that I had four people
18 leasing from me at that time. And I'm not sure what
19 relevance it is to have anyone other than -- what we're
20 really talking about today is Linda Cook.
21 Q. That's okay. We're not here to decide what's
22 relevant or not relevant.
23 A. Right.
24 Q. We're just here to listen to the questions I
25 ask, and answer those questions. And I think your

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1 attorney has informed you of that.
2 A. Correct.
3 Q. So I need you to do that; okay?
4 A. This is what I remember, that Linda Cook
5 leased a spot from me in 2010.
6 Q. Who else leased spots from you in 2010?
7 A. I had a massage therapist that was leasing a
8 spot from me.
9 Q. What was her name?
10 A. It was a male.
11 Q. Male.
12 A. Jim. I can't remember Jim's last name.
13 And I had a couple hairdressers leasing spots
14 from me back then. And I don't really remember their
15 names either.
16 And my sister leased a spot from me.
17 Q. Do you have any records of who these people
18 were?
19 A. No, I don't.
20 Q. You didn't have any written lease agreements
21 with them either, did you?
22 A. Oh, absolutely.
23 Q. Do you have those lease agreements now?
24 A. No, I don't.
25 Q. Do you know where they are?

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1 A. Yes, I do.
2 Q. Where are they?
3 A. In the trash. After I closed my salon, I was
4 rejoicing like nobody's business, and anything that
5 pertained to my business went straight into the trash,
6 because I was done.
7 In fact, I'm not even sure I have old
8 appointment books.
9 Q. You don't have written independent contractor
10 agreements with these people either, do you?
11 A. I had written contract agreements, lease
12 agreements, for everyone that ever leased a spot from me
13 at Fingerprints. But when I closed my business, as I
14 previously just stated, I threw everything away because
15 who knew that I would need it three years later.
16 Q. You said you were particularly rejoicing about
17 closing down the salon. Is there any reason why?
18 A. Yes.
19 Q. Why was that?
20 A. Because I have been doing this for 25 years,
21 and I was hurt in a car accident, and I needed to just
22 rest and be quiet. I've spent over two years in a chair
23 from a car accident.
24 Q. Besides the equipment that you described
25 earlier, that you owned in relation to the salon, did

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1 you also provide tools and materials for . . .
2 A. Absolutely not.
3 Q. Who provided those?
4 A. The "leasors."
5 MR. WRIGHT: Just to be clear, I think you
6 mean the "lessees."
7 THE WITNESS: Lessees, yes, that's true.
8 Sorry.
9 Q. (BY MR. JACOBSON) As far as you, just the
10 work that you did at the salon in 2010, what types of
11 manicure and pedicure instruments would you use? Would
12 they be wooden, or would they be metallic?
13 A. I personally used metal, because it was easier
14 to sanitize. What the other girls used, I can't tell
15 you. It was up to them to decide what they used.
16 Q. Did you ever observe what they used?
17 A. I really did not.
18 Q. So you couldn't say one way or the other as
19 far as wooden or metallic for the other --
20 A. Everyone --
21 Q. -- technicians?
22 A. -- used different stuff. You know, it was
23 their personal decision to decide what they wanted to
24 use in their business. Just like it's my personal
25 decision to decide what I use in my business.

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<p>1 Q. Did you ever have any requirements of them as</p> <p>2 to when they needed to be at the salon?</p> <p>3 A. Absolutely not.</p> <p>4 Q. They could come and go as they chose?</p> <p>5 A. Yes.</p> <p>6 Q. They could set appointments as they wanted to?</p> <p>7 A. Yes.</p> <p>8 Q. What about lunch; were you ever concerned or</p> <p>9 upset when they would take a lunch?</p> <p>10 A. None of my business.</p> <p>11 Q. Did you ever provide any type of promotional</p> <p>12 offer or coupon-type offer in relation to the salon?</p> <p>13 MR. WRIGHT: Object to the form.</p> <p>14 THE WITNESS: Me personally?</p> <p>15 Q. (BY MR. JACOBSON) You or in relation to</p> <p>16 Fingerprints, generally.</p> <p>17 A. No. My clients -- I've had a full clientele</p> <p>18 for years.</p> <p>19 Q. Did you ever run a coupon book --</p> <p>20 A. Me personally?</p> <p>21 Q. -- offer? Yes.</p> <p>22 A. No.</p> <p>23 COURT REPORTER: If you would please wait for</p> <p>24 him to finish the question, that would be great.</p> <p>25 Q. (BY MR. JACOBSON) Why did you distinguish you</p> <p style="text-align: right;">[Page 24]</p>	<p>1 Q. Did you observe any of the other technicians</p> <p>2 that were there using gloves when they provided</p> <p>3 services?</p> <p>4 A. I don't recall.</p> <p>5 Q. I want to ask you again about these foot</p> <p>6 basins that you were describing in relation to the</p> <p>7 pedicure stations. Was there any standard or</p> <p>8 requirement with respect to the temperature of the water</p> <p>9 that was in those basins?</p> <p>10 MR. WRIGHT: Object to the form.</p> <p>11 Q. (BY MR. JACOBSON) Did you place any</p> <p>12 requirement as to what the temperature of the water</p> <p>13 needed to be in those foot basins when pedicure services</p> <p>14 were being performed using them?</p> <p>15 A. No.</p> <p>16 Q. Are you aware of any other standard that was</p> <p>17 used at the salon in terms of the temperature of the</p> <p>18 water in those foot basins?</p> <p>19 A. No.</p> <p>20 Q. Did anyone ever measure the temperature of the</p> <p>21 water in the foot basins when they used them to perform</p> <p>22 pedicure services?</p> <p>23 MR. WRIGHT: Objection; foundation.</p> <p>24 THE WITNESS: I don't know, you know.</p> <p>25 Q. (BY MR. JACOBSON) Did you ever perform</p> <p style="text-align: right;">[Page 26]</p>
<p>1 personally, no? Were there others that you were aware</p> <p>2 of that were offering coupon offers in relation to</p> <p>3 Fingerprints?</p> <p>4 A. Oh, yes. The girls would get together. You</p> <p>5 know, the new people that came in, signed leases, that</p> <p>6 were trying to get clientele, they would often get</p> <p>7 together as a group and run promotional ads.</p> <p>8 But me personally, I've had a full clientele</p> <p>9 for years, and I have had no need to do that.</p> <p>10 Q. So you never ran any coupon offer in relation</p> <p>11 to Fingerprints Day Spa and then required the other</p> <p>12 technicians to honor those coupons?</p> <p>13 A. No.</p> <p>14 Q. Did you get any additional money or percentage</p> <p>15 of service fees for work that the other technicians did?</p> <p>16 A. No.</p> <p>17 Q. You never got a piece of their service</p> <p>18 payment?</p> <p>19 A. I wished. No, I did not.</p> <p>20 Q. Were there ever any requirements as to the</p> <p>21 volume of customers that they needed to service?</p> <p>22 A. No.</p> <p>23 Q. Did you use gloves when you provided services</p> <p>24 at Fingerprints? And, again, this is back in 2010.</p> <p>25 A. No.</p> <p style="text-align: right;">[Page 25]</p>	<p>1 services using these pedicure foot basins? And this is,</p> <p>2 again, back in 2010.</p> <p>3 A. Yes.</p> <p>4 Q. Did you ever take the temperature of the water</p> <p>5 that you used in these foot basins?</p> <p>6 A. No.</p> <p>7 Q. Did you have any procedure or standard with</p> <p>8 respect to providing services, using these foot basins,</p> <p>9 for people who had cuts or sores on their feet?</p> <p>10 A. Again, I'm unclear about your line of</p> <p>11 questioning. In regards to my own clientele, yes. I do</p> <p>12 a lot of people that are diabetic, that have special</p> <p>13 needs; they're elderly. And I've always been very</p> <p>14 cognizant of the temperature of the water, the</p> <p>15 sanitation, my implements, because I do work on people</p> <p>16 that have special needs.</p> <p>17 And, yes, I have always taken every precaution</p> <p>18 to make sure that my clients have the appropriate</p> <p>19 temperature in their water, the appropriate sanitation.</p> <p>20 And I go above and beyond just to make sure those</p> <p>21 clients remain safe when I am working on my clients.</p> <p>22 Q. Now, just so that I understand, you testified</p> <p>23 just previously that you never took the temperature of</p> <p>24 the water that you used in the foot basins.</p> <p>25 A. That was the temperature of what other people</p> <p style="text-align: right;">[Page 27]</p>

1 are using in the foot basins.
 2 Now, for myself, of course I know what the
 3 water temperature is. I know that they've been
 4 sanitized. I know that I am working on somebody that
 5 has a medical condition. And I am aware of all of that.
 6 What the other girls do when they do their
 7 services, I have no idea what they do. It is none of my
 8 business. What my business is, is when I work on my
 9 clients only.
 10 Q. When would you take the temperature of the
 11 water when you serviced your clients?
 12 A. Well, I would put my hand in it, and if it was
 13 too hot for my hand, it was probably too hot for their
 14 feet.
 15 Q. What other procedures or protocols did you
 16 undergo or perform with respect to people who had cuts
 17 or sores on their feet?
 18 A. I just answered that.
 19 Q. Nothing else beyond what you just said?
 20 A. Well, there's really not much more that I can
 21 do, other than to make sure that everything I'm using is
 22 cleaned, sanitized, even above industry standards,
 23 especially for special needs clients such as diabetics.
 24 Q. You were responsible for the cleaning and
 25 sanitation of the equipment at the salon back in 2010;
 [Page 28]

1 is that right?
 2 MR. WRIGHT: Object to the form. Misstates
 3 prior testimony.
 4 Q. (BY MR. JACOBSON) Go ahead and answer if you
 5 can.
 6 A. I am responsible for when I use the pedicure
 7 stations or any other thing in the salon, that I don't
 8 rely on the last person, who should have cleaned and
 9 sanitized it. I take my own initiative and sanitize it
 10 again before my personal clients.
 11 Q. And you took no other efforts to sanitize any
 12 other tools or equipment at the salon other than the
 13 ones that you used; is that right?
 14 A. That is correct.
 15 Q. What was your procedure or protocol for
 16 cleaning and sanitizing the equipment that you used at
 17 the salon back in 2010?
 18 A. Well, I would clean the pedicure chair,
 19 whether it looked clean or not. And I would run some
 20 Let's Touch through the jets. And all my implements
 21 were always soaked in Barbicide or put in the autoclave
 22 before and after every client.
 23 Q. So you went through that cleaning routine
 24 before and after --
 25 A. Correct.
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1 Q. -- every client?
 2 A. That pertains to me and my personal clients
 3 only.
 4 Q. When you say "before and after," does that
 5 mean that, for each client that you serviced, there were
 6 two of these cleansing routines that you went through?
 7 A. No. I would only do the sanitizer before the
 8 jets, and the jets before my clients. But the tub is
 9 cleaned, you know, before and after every time.
 10 We have the cleanest pedicure stations in
 11 town.
 12 Q. How do you know that?
 13 A. Well, because I've been inspected. I've been
 14 in this business for a long time. With regards to the
 15 Bureau of Occupational Licenses, every time the salon
 16 had ever been inspected, we've only gotten grade A's.
 17 Everyone that leased from me, their individual
 18 stations got inspected for sanitizing and all that, and
 19 they always got A's. Anyone that's ever leased from me,
 20 or my business, personally has never gotten anything
 21 below a grade A.
 22 Q. Do you have any of these inspection report
 23 results?
 24 A. Again, I don't, but they're on file at the
 25 Bureau of Occupational Licenses.
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1 Q. Were you aware of any manufacturer
 2 requirements with respect to cleaning or sanitizing
 3 these foot basins?
 4 A. No.
 5 Q. And, again, it's your testimony that you don't
 6 have any idea what the other technicians did with
 7 respect to cleansing or sanitizing equipment or these
 8 stations?
 9 A. No. I basically relied on the Bureau of
 10 Occupational Licenses to do their job and inspect each
 11 business owner and give their inspection results.
 12 Everyone had their own inspection results at
 13 their stations. They had their license at their
 14 stations. The State came in and inspected everyone
 15 yearly, sometimes twice a year.
 16 So I relied on the State to do their job and
 17 say, yes, everyone that is working, leasing under you,
 18 under their own business, has met the State requirement.
 19 Q. Do you know how many State inspections
 20 occurred at your facility in 2010?
 21 A. I think two. About every six months.
 22 Q. And . . .
 23 A. And each person, just so you're clear, the
 24 lessors -- the lessees, are required by the State to
 25 have their own sanitation, their own everything.
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<p>1 So the inspector goes to each person and says, 2 "What sanitizers are you using? Can we see your 3 implements? What are you using to sanitize the pedicure 4 chairs when you use them?" 5 So the State comes in and regulates these 6 girls. I don't have to. 7 Q. Do you have any receipts as far as your 8 purchase of sanitizing materials, such as the Barbicide 9 that you mentioned, but any other sanitizing materials 10 that you purchased in 2010? 11 A. Probably not. 12 May I say something? And I just -- 13 Q. Do you want to -- 14 A. I would like to say something. Again, I'm 15 unclear what my receipts for my sanitizing for my 16 clients, what relevance that would have on this case 17 today. I'm confused as to that. 18 Q. Ms. Peabody, this is a discovery deposition. 19 A. Oh, okay. 20 Q. And during the course of a discovery 21 deposition, there is the opportunity for me to ask, 22 normally, questions that have relevance, but that are 23 reasonably calculated to lead to the discovery of 24 admissible evidence. 25 A. Okay.</p> <p style="text-align: right;">[Page 32]</p>	<p>1 Sales prior to today? 2 A. No. 3 Q. Have you ever spoken with Tracy Sales in the 4 past? 5 A. Not that I can remember. 6 Q. Are you aware of any statements that Tracy 7 Sales may have made in relation to Fingerprints Day Spa 8 or to the subject matter of this lawsuit? 9 A. No. 10 Q. Have you ever had a conversation with Linda 11 Cook regarding this lawsuit? 12 A. Yes. 13 Q. When did this conversation occur? 14 A. Probably after you called me. 15 Q. Would that have been in the spring of 2012? 16 A. That would have been then, because I had no 17 prior knowledge. 18 Q. And what did you and Ms. Cook discuss when you 19 called her? 20 A. Well, me and Ms. Cook discussed that she had a 21 problem. 22 Q. And what was her problem? 23 A. That somebody she didn't buy Nu Skin from is 24 suing her. 25 Q. Why did you say that to her?</p> <p style="text-align: right;">[Page 34]</p>
<p>1 Q. That casts a very broad net in terms of what I 2 get to inquire into during the course of this 3 deposition. 4 A. Okay. 5 Q. And, again, your testimony is that you have no 6 knowledge as to what the other technicians were doing by 7 way of cleaning routines, or disinfectant materials, or 8 anything related to the sanitation of equipment or tools 9 at the salon in 2010? 10 MR. WRIGHT: Objection. Misstates her prior 11 testimony. 12 Q. (BY MR. JACOBSON) Go ahead and answer if you 13 can, or clarify where you feel you need to. 14 A. Well, again -- I'll repeat myself. Again, I 15 rely on the State, the Bureau of Occupational Licenses, 16 to come in and do their inspections on everyone that had 17 their own individual license, working at the salon, to 18 do their job. That is their job, not my job. 19 Q. Did the State Bureau of Licenses give you any 20 advanced notice as to when they would arrive for their 21 inspections, or were they on a particular schedule? 22 A. Never. It was all random. 23 Q. Do you know who Tracy Sales is? 24 A. I'm assuming it's this lady right here. 25 Q. Have you ever had any interactions with Tracy</p> <p style="text-align: right;">[Page 33]</p>	<p>1 A. Because Linda and I had discussed that her and 2 Ms. Sales had had somewhat of a relationship, that she 3 had come to Linda several times and that Ms. Sales had 4 tried to sell her some Nu Skin products. She declined. 5 And that they had several conversations and 6 opportunities for Ms. Sales to say that she was having 7 problems with her pedicure, or her foot, and she never 8 did. 9 Q. Are you aware of Ms. Sales' medical treatment 10 in any way? 11 A. No. 12 Q. Any other reason why you said that Linda Cook 13 had a problem because she didn't buy Nu Skin from 14 Ms. Sales? 15 A. Well, I thought it was kind of a frivolous 16 suit, given that it had been two years and Ms. Sales had 17 never said to Linda that, "Hey, I'm having some 18 problems. Could you look at it? Do you have anything?" 19 I just thought it was rather weird that, two 20 years later, that this would come up, when there was 21 plenty of opportunity to discuss the matter before now. 22 Q. Do you have any other reason to believe that 23 the lawsuit is frivolous beyond the time frame in which 24 it was brought? 25 MR. WRIGHT: Object to the form.</p> <p style="text-align: right;">[Page 35]</p>

1 Q. (BY MR. JACOBSON) Go ahead and answer if you
2 can.
3 A. Rephrase, please.
4 Q. Do you have any other basis or reason for
5 believing that this lawsuit is frivolous beyond the
6 period in which it was brought?
7 MR. WRIGHT: Object to the form. Calls for a
8 legal conclusion.
9 Q. (BY MR. JACOBSON) Go ahead and answer, if you
10 can.
11 A. I'm still not really understanding the
12 question.
13 Q. Any other reason why you think this lawsuit is
14 frivolous besides what you said?
15 MR. WRIGHT: I'll renew the objection.
16 You can answer if you understand the question.
17 THE WITNESS: No.
18 Q. (BY MR. JACOBSON) During this conversation
19 that you and Ms. Cook had in the spring of 2012, what
20 else did you talk about besides Ms. Cook's problem?
21 A. Well, the fact that Ms. Sales could have, at
22 any time, again, talked to Linda, when she had talked to
23 her several times after the alleged incident; which, I'm
24 not sure what really happened there; that Ms. Sales
25 could have gone to any number of salons, and not

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1 disclosed that, and gotten pedicures somewhere else; she
2 could have gone to the gym; she could have picked at her
3 own toenail.
4 And, in fact, that she's probably just trying
5 to blame it on somebody else; that there was plenty of
6 opportunity, for the condition that Ms. Sales has, to
7 have gotten anywhere.
8 Q. And these were statements that you made to
9 Linda Cook?
10 A. Oh, no. We discussed it back and forth. I
11 mean, it's just like, really? After two years?
12 Q. What did Linda Cook say to you in regard to,
13 well, this could have happened somewhere else?
14 A. Well, Ms. Cook is under the opinion that I
15 have, that this could have been taken care of far sooner
16 than it was; that if Ms. Sales had gone, seen a doctor,
17 opened her mouth to Ms. Cook and said, "You know, I'm
18 having some problems. Would you like to take a look at
19 it?" Instead of just, you know, trying to sell her
20 Nu Skin after the pedicure.
21 Q. Were you aware of any of Ms. Sales' other
22 activities, such as going to gyms or other pedicure or
23 manicure places?
24 A. No; that's just an assumption. Those are many
25 of the places that somebody could get any kind of foot

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1 infection or toe infection, you know. I mean, I'm sure
2 Ms. Sales didn't only come to my salon in the period of
3 two years, and she's never done anything else to --
4 Q. That's just speculation on your part, isn't
5 it?
6 A. Absolutely, speculation.
7 Q. Any other statements that you made to Ms. Cook
8 or that she made to you during this phone conversation
9 in the spring of 2012?
10 A. No; other than that we just assumed that
11 Ms. Sales probably got it somewhere else and was just
12 looking for someone to blame.
13 Q. Have you had any conversations with Ms. Cook
14 since that telephone call in the spring of 2012?
15 A. Yes.
16 Q. When?
17 A. Oh, I'm not sure.
18 Q. Approximately when?
19 A. Oh, I don't know; three weeks ago she called
20 to see if I could give her the name of an
21 air-conditioning guy that worked on our furnace -- that
22 worked on my furnace at Fingerprints, and I gave her the
23 name of somebody that could work on her furnace.
24 Q. Besides this conversation three weeks ago,
25 have you had any other communications with Ms. Cook

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1 about this lawsuit?
2 A. No.
3 Q. Are you aware of any other statements that
4 Ms. Cook has made in relation to this lawsuit or the
5 incident that's involved in it?
6 A. Not other than I've already stated.
7 Q. Who else have you spoken with about this
8 lawsuit besides your attorney?
9 A. My sister.
10 Q. What is your sister's name?
11 A. Debbie Hatch.
12 Q. And what have you and Debbie discussed
13 regarding this lawsuit?
14 A. Probably the frivolity of it.
15 Q. Do you mean the frivolous nature of it?
16 A. Correct.
17 Q. And what have you discussed in relation to the
18 frivolous nature of this lawsuit?
19 A. Well, just the fact that it's been two years.
20 And my sister has also been in the business a long time,
21 20 years, and she has never had any clients at any time
22 have any problems. I've never had any clients at any
23 time have any problems.
24 And that, you know, usually if a client does
25 have a problem, they would call me, or if my sister's

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1 clients would call her, that we would always be able to
 2 take care of it in a responsible manner; saying, "Well,
 3 you know, you may need to see a doctor," or, "Here, come
 4 back in and let me see what I can do," or whatever. You
 5 know. Usually there's an easier, softer way.
 6 Q. So if a client had a problem after being
 7 serviced by you, you would want to observe and evaluate
 8 it to determine whether they needed additional medical
 9 attention?
 10 MR. WRIGHT: Object to the form.
 11 THE WITNESS: Well, I think you're taking this
 12 the wrong way. I mean, Ms. Sales --
 13 Q. (BY MR. JACOBSON) Ms. Peabody, I'm just
 14 trying to understand your response.
 15 A. What I'm saying is, if a client has a problem,
 16 usually -- I don't know what kind of relationship
 17 Ms. Sales and Linda had, but I know what kind of
 18 relationship I have with my clients.
 19 And I know that -- like I've had clients that
 20 have had pedicures, and they say to me, "Well, I've got
 21 an ingrown toenail. Would you look at it?" And I say,
 22 "Sure."
 23 You know, if there's a problem or whatever,
 24 usually the client relationship, once you've serviced
 25 somebody more than once, it's -- you care about that

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1 person, and you want to make sure they're okay and that
 2 your service is okay.
 3 And if someone is communicating to you, you
 4 can say, "Well, here, let me take a look at it."
 5 You know, I've sent my clients to doctors for
 6 skin cancers that I've seen on their feet and their
 7 legs. Or I've recognized circulation problems in their
 8 feet, and I've said, you know, "I think you need to go
 9 see a doctor. This doesn't look right to me. It's not
 10 normal." You know, things like that.
 11 Like, I was actually surprised that, given the
 12 couple times -- I don't know. Linda kind of said her
 13 and Ms. Sales had a relationship. So I was surprised
 14 that Ms. Sales didn't say anything about her problem, as
 15 her and Linda's relationship grew about her problem,
 16 until a lawsuit. She had plenty of opportunities in
 17 regards with Ms. Cook to say something to her.
 18 Q. Do you feel that it's your responsibility,
 19 when you're servicing clients, that you have to
 20 determine when they may or may not need to seek medical
 21 treatment?
 22 MR. WRIGHT: I'm going to object to the form.
 23 THE WITNESS: No, it is not my responsibility.
 24 Q. (BY MR. JACOBSON) Is that something that is
 25 part of the State licensure for nail technicians?

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1 A. No, it is not.
 2 Q. Is that an expectation that you would have
 3 with respect to the other nail technicians that were
 4 working at Fingerprints Day Spa back in 2010?
 5 MR. WRIGHT: Object to the form.
 6 THE WITNESS: No, it is not. I do that with
 7 my personal clients, because I care.
 8 Now, what the other girls do with their
 9 clients is their decision.
 10 Q. (BY MR. JACOBSON) Anything else you and your
 11 sister Debbie have spoken about in relation to this
 12 lawsuit?
 13 A. Again, you know, women that work, doing the
 14 same kind of work, everyone owns their own business,
 15 does their same kind of clients; we're all just taken
 16 back a little bit by the fact that Ms. Sales waited this
 17 long and didn't, you know, say anything to anybody about
 18 her problem, and then all of a sudden decides to pin it
 19 on Linda.
 20 Q. Who are these other people that you're
 21 referring to?
 22 A. Well, basically me, Linda, and, you know, of
 23 course I've discussed it with my sister. I mean, I
 24 asked her, "In 25 years, have you ever had a client that
 25 has had any problems?" "No."

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1 Have I ever had a client that's had any other
 2 problems? No.
 3 "Linda, have you had a client that's ever had
 4 any other problems?" "No."
 5 Q. Anyone else that you've spoken to about this
 6 lawsuit that you haven't named for me yet?
 7 A. No.
 8 Q. Anyone else that you've spoken with about the
 9 incident involving Ms. Sales back in April of 2010?
 10 A. No.
 11 Q. And I just want to be clear in terms of your
 12 testimony. Is it your testimony that, with regard to
 13 the other technicians that were performing services at
 14 Fingerprints Day Spa back in 2010, that you had no
 15 control or oversight or responsibility for their
 16 activities in servicing clients?
 17 A. I had zero control.
 18 Q. And, again, is it your testimony that you took
 19 no other efforts and you had no other responsibility for
 20 cleaning equipment, tools, including the foot basins, on
 21 any station except the ones that you personally serviced
 22 clients at?
 23 A. That's correct.
 24 Q. And is it your testimony that you believe that
 25 you have done nothing wrong in relation to the incident

[Page 43]

<p>1 involving Ms. Sales?</p> <p>2 A. I have absolutely done nothing wrong.</p> <p>3 Q. Besides the cleaning procedure that you</p> <p>4 described that you went through with respect to your</p> <p>5 clients, where you would clean the station before</p> <p>6 servicing the client and after servicing the client, did</p> <p>7 you do any other cleansing or sanitizing activities?</p> <p>8 A. In regards to my own personal stuff?</p> <p>9 Q. Yes.</p> <p>10 A. Oh, absolutely, yes.</p> <p>11 Q. What else would you do?</p> <p>12 A. Well, we keep all of our -- well, I keep all</p> <p>13 of my implements, and, actually, all of the girls kept</p> <p>14 all of their stuff in sanitation stuff. I mean --</p> <p>15 because it's required by the State law.</p> <p>16 So everyone that worked in that building that</p> <p>17 had their own business, everyone basically observed the</p> <p>18 same sanitation. We would all clean our implements in</p> <p>19 sanitizing containers, including myself. Because if we</p> <p>20 get inspected, we could lose our licenses.</p> <p>21 Everyone is individually licensed. If the</p> <p>22 State board comes in and you're not in compliance with</p> <p>23 the sanitation, you could lose your license. And, you</p> <p>24 know, we don't know when we're going to be inspected.</p> <p>25 Q. Would everyone in the facility lose their</p> <p style="text-align: right;">[Page 44]</p>	<p>1 Q. What about with regard to the other</p> <p>2 technicians; what did you observe them do by way of</p> <p>3 cleaning or sanitizing activities?</p> <p>4 MR. WRIGHT: Objection; asked and answered.</p> <p>5 THE WITNESS: It's already been answered.</p> <p>6 Q. (BY MR. JACOBSON) You can go ahead and answer</p> <p>7 again.</p> <p>8 A. Well, to be honest with you, I really pretty</p> <p>9 much focused on my clients and what I was doing. The</p> <p>10 other girls, they had their own thing going on. It was</p> <p>11 their business. It was none of mine.</p> <p>12 Q. And the only reason that I ask, Ms. Peabody,</p> <p>13 is that you had just testified that you observed that</p> <p>14 they kept their tools in a sanitizing solution that was</p> <p>15 the same thing that you were keeping yours in.</p> <p>16 A. Well, what I observed is that they had their</p> <p>17 license and that they had their inspection at their</p> <p>18 thing, at their stations. That's what I observed.</p> <p>19 So if they had their license and their</p> <p>20 inspection that says "A," they had their stuff in State</p> <p>21 -- they had their stuff in whatever the State requires</p> <p>22 them to have their sanitizing stuff in. And I can't</p> <p>23 tell you if they used the same stuff I did, but I'm</p> <p>24 assuming, again, that the Bureau of Occupational</p> <p>25 Licenses did their job when they inspected these gals.</p> <p style="text-align: right;">[Page 46]</p>
<p>1 license?</p> <p>2 A. No, just the individual. It's an individual</p> <p>3 thing, you know. So everyone kept their stuff sanitized</p> <p>4 and in sanitizers, because, again, the inspector would</p> <p>5 come in and inspect every individually licensed person.</p> <p>6 Q. What type of sanitizing solution would you</p> <p>7 keep your tools in?</p> <p>8 A. It's called Let's Touch or Barbicide. Those</p> <p>9 are the industry standards.</p> <p>10 Q. And did the other technicians also keep their</p> <p>11 tools in the same sanitizing solution?</p> <p>12 MR. WRIGHT: Objection; foundation.</p> <p>13 THE WITNESS: I can answer it.</p> <p>14 I'm assuming so, because the Bureau of</p> <p>15 Occupational Licenses gave them a grade A sanitation.</p> <p>16 So they were inspected; they got their</p> <p>17 grade A; so I'm assuming they did. Unless, of course,</p> <p>18 the, you know, Bureau of Occupational Licenses wasn't</p> <p>19 doing their job.</p> <p>20 Q. (BY MR. JACOBSON) What other sanitation</p> <p>21 activities would you go through besides keeping your</p> <p>22 tools in the sanitation solution that you described?</p> <p>23 A. Really there's no other. I mean, that's it.</p> <p>24 You sanitize your implements; you clean your stuff, you</p> <p>25 know, before you use it; and that's what you do.</p> <p style="text-align: right;">[Page 45]</p>	<p>1 Q. And I believe you said that the Bureau of</p> <p>2 Occupational Licenses made their inspections no more</p> <p>3 than twice a year?</p> <p>4 A. Correct.</p> <p>5 Q. Ms. Peabody, did you grow up in the Treasure</p> <p>6 Valley?</p> <p>7 A. No.</p> <p>8 Q. Where were you born?</p> <p>9 A. Idaho Falls.</p> <p>10 Q. And how long did you live in Idaho Falls?</p> <p>11 A. Probably until I was, like, five or six.</p> <p>12 Q. And then where did you move after that?</p> <p>13 A. California.</p> <p>14 Q. And how long did you live in California?</p> <p>15 A. About four years.</p> <p>16 Q. Did you move around frequently growing up?</p> <p>17 A. Yes. My father was in the military.</p> <p>18 Q. I'm not going to ask you to go through that</p> <p>19 catalog, then.</p> <p>20 A. Well, I certainly can.</p> <p>21 Q. Where did you graduate from high school at?</p> <p>22 A. Boise High.</p> <p>23 Q. So when did you move to Boise; do you remember</p> <p>24 that?</p> <p>25 A. In 1980.</p> <p style="text-align: right;">[Page 47]</p>

1 Q. And did you obtain any college or secondary
2 education beyond high school?
3 A. Yes.
4 Q. What did you receive by way of secondary
5 education?
6 A. I went to nail school and got my license.
7 Q. And so when were you first licensed as a nail
8 technician in Idaho?
9 A. When I was 20 years old.
10 Q. And since that time to the present -- and you
11 can correct me if I'm wrong --
12 A. Okay.
13 Q. Since that time to the present, is that the
14 same period approximately that you had Fingerprints Day
15 Spa?
16 A. Oh, no. I worked for a couple other salons
17 before I opened my own company.
18 Q. Are any of those salons that you worked for
19 still in business that you know?
20 A. I don't know.
21 Q. Do you recall the names of these other salons
22 that you've worked for?
23 A. Uh-huh (nodding head).
24 Q. What are they?
25 A. Let's see. Looks Unlimited. The Place To Be.

[Page 48]

1 Yeah, those are the two shops I worked for before I
2 opened my own company.
3 Q. Do you remember approximately the year that
4 you started Fingerprints Day Spa?
5 A. Let me see. I think 1987.
6 Q. Are you married?
7 A. Yes.
8 Q. And how long have you been married?
9 A. Ten years.
10 Q. And what is your husband's name?
11 A. Jim Baugh.
12 Q. And have you ever spoken with Jim about this
13 lawsuit?
14 A. No.
15 Q. The two of you have never talked about it?
16 A. We're separated right now.
17 Q. I see. How long have you been separated?
18 A. Two years.
19 Q. Do you have any children?
20 A. Yes.
21 Q. How many children do you have?
22 A. Two. My son Tanner is 21, and my daughter
23 Shyanne is 19.
24 Q. Have you ever talked to Tanner or Shyanne
25 about this lawsuit?

[Page 49]

1 A. No.
2 Q. They're not interested?
3 A. No. God no.
4 MR. JACOBSON: I don't think that I have any
5 other questions at this time.
6 MR. WRIGHT: I don't have any questions.
7 (Deposition concluded at 10:12 a.m.)
8 (Signature requested.)
9
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[Page 50]

1 CERTIFICATE OF WITNESS
2 I, STACIE PEABODY, being first duly sworn, depose
3 and say:
4 That I am the witness named in the foregoing
5 deposition, consisting of pages 1 through 50; that I
6 have read said deposition and know the contents thereof;
7 that the questions contained therein were propounded to
8 me; and that the answers contained therein are true and
9 correct, except for any changes that I may have listed
10 on the Change Sheet attached hereto.
11 DATED this ____ day of _____, 2013.
12
13
14 STACIE PEABODY
15 SUBSCRIBED AND SWORN to before me this ____ day of
16 _____, 2013.
17
18
19 NAME OF NOTARY PUBLIC
20
21 NOTARY PUBLIC FOR _____
22 RESIDING AT _____
23 MY COMMISSION EXPIRES _____
24
25

[Page 51]

1	CHANGE SHEET FOR STACIE PEABODY	
2	Page__ Line__ Reason for Change__	
	Reads__	
3	Should Read__	
4	Page__ Line__ Reason for Change__	
	Reads__	
5	Should Read__	
6	Page__ Line__ Reason for Change__	
	Reads__	
7	Should Read__	
8	Page__ Line__ Reason for Change__	
	Reads__	
9	Should Read__	
10	Page__ Line__ Reason for Change__	
	Reads__	
11	Should Read__	
12	Page__ Line__ Reason for Change__	
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13	Should Read__	
14	Page__ Line__ Reason for Change__	
	Reads__	
15	Should Read__	
16	Page__ Line__ Reason for Change__	
	Reads__	
17	Should Read__	
18	Page__ Line__ Reason for Change__	
	Reads__	
19	Should Read__	
20	Page__ Line__ Reason for Change__	
	Reads__	
21	Should Read__	
22	Page__ Line__ Reason for Change__	
	Reads__	
23	Should Read__	
24	Please use a separate sheet if you need more room.	
25	WITNESS SIGNATURE__	
[Page 52]		

REPORTER'S CERTIFICATE.

I, EMILY L. NORD, CSR No. 695, Certified
Shorthand Reporter, certify:

That the foregoing proceedings were taken
before me at the time and place therein set forth, at
which time the witness was put under oath by me;

That the testimony and all objections made
were recorded stenographically by me and were thereafter
transcribed by me, or under my direction;

That the foregoing is a true and correct
record of all testimony given, to the best of my
ability.

I further certify that I am not a relative or
employee of any attorney or party, nor am I financially
interested in the action.

IN WITNESS WHEREOF, I set my hand and seal
this 1st day of April, 2013.

EMILY L. NORD, CSR, RPR

Notary Public

P.O. Box 2636

Boise, Idaho 83701-2636

My Commission expires November 5, 2017.

EXHIBIT B

000148



SALES, TRACY W

52 Y old Female, DOB: 05/24/1958
4154 TICONDEROGA, BOISE, ID-83706

Home: 208-867-5800

Guarantor: SALES, TRACY W

Insurance: PACIFICSOURCE HEALTH (S) Payer ID: 93029

Referring: David C Nielsen, MD

02/14/2011

Progress Notes: David C. Nielsen, MD

Current Medications

Antioxidant Formula 1 tab(s) once a day
Bone Builder OTC 1 tab BID
vitally as directed daily
clobetasol topical 0.05% as directed BID

Past Medical History

Asthma
Psoriasis
Hemorrhoids
Fatigue
Esophageal reflux
Eczema
MVP without regurg
h/o motorcycle accident with LOC coma
amnesia
sinusitis Dr AC Jones
Allergic rhinitis

Allergies

N.K.D.A

Reason for Appointment

1. just finished course of cipro with Dr. chandler
2. Depression, hormones, onychomycoses, concern about mycobacterial infectino in her toe.

History of Present Illness

General Notes:

depression--She is tearful and feels that recent events have been very stressful. She feels that she has been told many different explanations regarding her toe and this has been extremely frustrating and confusing. She feels that all of her symptoms developed after her pedicure. She brings literature regarding mycobacterial infections after pedicures and wonders if she needs more antibiotics.

hormones--She is trying an OTC medication in attempts to calm her mood and hormones.

Vital Signs

BP 158/90, HR 88.

Examination

Brief Examination:

GENERAL APPEARANCE: pleasant, NAD, vitals as noted..
LUNGS: clear to auscultation, clear to percussion, no wheezes or crackles. EXTREMITIES: no edema, no cyanosis, no clubbing.
PERIPHERAL PULSES: 2+ bilaterally at the lower extremities..
SKIN: Right great toe with new nail growth covering 2/3 of nail area. No evidence of fluctuance/abscess. Evidence of bony and soft tissue hypertrophy. Erythema reduced from last exam. No evidence of pustules cellulitis but clearly evidence of now chronic inflammation and remodeling of the toe joint..

Assessments

1. Depressive Disorder NOC - 311 (Primary), Tracey is very emotional and tearful, reporting openly that she feels depressed and needs help. She denies SI/III. She is receptive to use of an antidepressant.
2. Psoriatic arthritis - 696.0, She has been evaluated by podiatry, infectious disease, Dr Coffman, dermatology Dr's Ming. She was treated for an extended time with IV antibiotics including Vancomycin. She was then instructed to use indomethacin and topical steroids.
3. Onychomycosis - 110.1, She has been seen by podiatry, ID, and dermatology. She elected to not use and oral antifungal and possibly used Vicks. The nail is growing. Because of the psoriatic arthritis and

Patient: SALES, TRACY W DOB: 05/24/1958 Progress Note: David C. Nielsen, MD 02/14/2011

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acute inflammation it appears that she may have damaged the nail matrix and will have a deformed nail. This was discussed with her today.

Treatment

1. Depressive Disorder NOC

Start escitalopram tablet, 20 mg, orally, 30, 1 tab(s), once a day, Refills 6

She will begin escitalopram, taking in PM. She was encouraged to increase her activity and engage in enjoyable and meaningful activity.

2. Psoriatic arthritis

She was encouraged to follow recommendations provided by other specialists.

3. Onychomycosis

She will allow the nail to grow out and later determine what if any treatment will be added.

4. Others

Continue clobetasol topical solution, 0.05%, applied topically, 30 gm, as directed, BID, Refills 5

A total of 38 minutes were spent face-to-face with the patient during the encounter and over half of that time was spent on counseling and coordination of care. (Total time = 38, counseling time = 30.) We discussed mycobacterial infections, onychomycosis, psoriasis, depression, anxiety.

Follow Up

4 Weeks



Electronically signed by David Nielsen MD on 02/17/2011 at 03:33 PM MST

Sign off status: Completed

SLIM Cloverdale/McMillan Office
4840 N Cloverdale Rd

Boise, ID 83713
Tel: 208-706-8000
Fax: 208-706-8001

Patient: SALES, TRACY W DOB: [REDACTED] Progress Note: David C. Nielsen, MD 02/14/2011

Note generated by eClinicalWorks EMR/PM Software (www.eClinicalWorks.com)



SALES, TRACY W

52 Y old Female, DOB: 05/24/1958
4154 TICONDEROGA, BOISE, ID-83706

Home: 208-559-2733

Guarantor: SALES, TRACY W

Insurance: PACIFICSOURCE HEALTH (S) Payer ID: 93029

Referring: David C Nielsen, MD

12/07/2010

Progress Notes: David C. Nielsen, MD

Current Medications

Rocephin 2 g 2 g once a day
clobetasol topical 0.05% as directed BID
Antioxidant Formula 1 tab(s) once a day
Bone Builder OTC 1 tab BID
vitality as directed daily

Past Medical History

Asthma
Psoriasis
Hemorrhoids
Fatigue
Esophageal reflux
Eczema
MVP without regurg
h/o motorcycle accident with T.O.C. coma
amnesia
sinusitis Dr AC Jones
Allergic rhinitis

Allergies

N.K.D.A.

Reason for Appointment

1. Recheck toe

History of Present Illness

General Notes:

right great toe osteomyelitis--because of imaging studies and history supportive of a diagnosis of osteomyelitis of her right great toe she was started on Rocephin. PICC line was placed. She is tolerating the Rocephin without difficulty. She comes today reporting that she is having increased pain, erythema, and swelling.

right great toe infection--this started in May when she had a fungal infection in the toe nail. The nail came off in October. A couple weeks after the nail came off the toe became red. She has been on 14 days of Keflex. MRSA PCR was obtained and was negative.

Vital Signs

BP 148/80, HR 80, Temp 98.1.

Examination

Brief Examination:

GENERAL APPEARANCE: pleasant, NAD, vitals as noted..
LUNGS: clear to auscultation, clear to percussion, no wheezes or crackles. EXTREMITIES: no edema, no cyanosis, no clubbing.
PERIPHERAL PULSES: 2+ bilaterally at the lower extremities..
SKIN: Right great toe with moderate swelling and erythema, nail absent with evidence of new nail growth. No evidence of fluctuance/abscess. Swelling extends from the tip of the toe to the proximal toe without extension into the MTP. Erythema covers the entire toe and a trivial amount to the region of the MTP.

Assessments

1. Osteitis of other specific site NEC - 730.28 (Primary), Patient had imaging studies suggestive of osteomyelitis. PICC line was placed and she was started on Rocephin 2 g daily. This was after a 14 day course of Keflex. She returns to clinic today reporting increased pain, swelling, and erythema. By my exam he does appear mildly worse. I am concerned about a possible resistant organism.

Treatment

1. Osteitis of other specific site NEC

Vancomycin 800 mg IV daily will be added. She will have a vancomycin trough obtained Monday morning. She will continue Rocephin 2 g

Patient: SALES, TRACY W DOB: [REDACTED] Progress Note: David C. Nielsen, MD 12/07/2010
Note generated by e [REDACTED] M Software (www.eClinicalWorks.com)

daily. She will followup in infectious disease Tuesday at 11 AM.

2. Others

Start mometasone topical cream, 0.1%, applied topically, 30 gms, as directed, once a day, Refills 1

Follow Up

3 Weeks



Electronically signed by David Nielsen MD on 12/07/2010 at 07:05 PM MST

Sign off status: Completed

SLIM Cloverdale/McMillan Office
4840 N Cloverdale Rd
Boise, ID 83713
Tel: 208-706-8000
Fax: 208-706-8001

Patient: SALES, TRACY W DOB [REDACTED] Progress Note: David C. Nielsen, MD 12/07/2010

Note generated by eClinicalWorks EMR/PM Software (www.eClinicalWorks.com)



SALES, TRACY W

52 Y old Female, DOB: 05/24/1958
4154 TICONDEROGA, BOISE, ID-83706

Home: 208-559-2733

Guarantor: SALES, TRACY W

Insurance: PACIFICSOURCE HEALTH (S) Payer ID: 93029

Referring: David C Nielsen, MD

12/01/2010

Progress Notes: David C. Nielsen, MD

Current Medications

clobetasol topical 0.05% as directed BID
Antioxidant Formula 1 tab(s) once a day
Bone Builder OTC 1 tab BID
vitality as directed daily

Past Medical History

Asthma
Psoriasis
Hemorrhoids
Fatigue
Esophageal reflux
Eczema
MVP without regurg
h/o motorcycle accident with LOC coma
amnesia
sinusitis Dr AC Jones
Allergic rhinitis

Allergies

N.K.D.A

Reason for Appointment

1. Infected toe
2. Finished abx 2 days ago, painful, unable to wear shoe

History of Present Illness

General Notes:

right great toe infection--this started in May when she had a fungal infection in the toe nail. The nail came off in October. A couple weeks after the nail came off the toe became red. She has been on 14 days of Keflex. She doesn't have any possible MRSA exposure that she is aware of. In spite of 14 days treatment with antibiotics she reports that the toe continues to have significant pain, redness, and swelling.

Vital Signs

BP 142/70, HR 76, Temp 97.1.

Examination

Brief Examination:

GENERAL APPEARANCE: pleasant, NAD, vitals as noted.
LUNGS: clear to auscultation, clear to percussion, no wheezes or crackles. EXTREMITIES: no edema, no cyanosis, no clubbing.
PERIPHERAL PULSES: 2+ bilaterally at the lower extremities.
SKIN: Right great toe with moderate swelling and erythema, nail absent with evidence of new nail growth. No evidence of fluctuance/abscess. Swelling in the region of the PTP, no significant swelling at the MTP.

Assessments

1. Cellulitis of toe NOS - 681.10 (Primary). The right great toe is warmer than the left and other adjacent toes. She has no evidence of fluctuance or abscess. There is a very tiny area of eschar at the nail matrix area. No evidence of purulence. Resistant cellulitis is very probable, acute gout, pseudogout, osteoarthritis would also be included in the differential.

Treatment

1. Cellulitis of toe NOS

Start sulfamethoxazole-trimethoprim tablet, 800 mg-160 mg, orally, 28, 1 tab(s), 2 times a day, Refills 0

Start doxycycline capsule, monohydrate 100 mg, orally, 28, 1 cap(s), 2 times a day, Refills 0

LAB: CRP/C-REACTIVE PROTEIN

LAB: ESR / SED RATE

Patient: SALES, TRACY W DOB: [REDACTED] Progress Note: David C. Nielsen, MD 12/01/2010

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Diagnostic Imaging: TOES 2V MIN

We'll obtain CRP and sedimentation rate. Radiograph of the great toe will be obtained. If radiographs do not suggest gout or pseudogout we will reinstate antibiotics for possible MRSA including Septra and doxycycline. If inflammatory markers significantly elevated will consider referral to ID or ortho.

Follow Up

4 Weeks



Electronically signed by David Nielsen MD on 12/02/2010 at 03:59 PM MST

Sign off status: Completed

SLIM Cloverdale/McMillan Office
4840 N Cloverdale Rd
Boise, ID 83713
Tel: 208-706-8000
Fax: 208-706-8001

Patient: SALES, TRACY W DOB: [REDACTED] Progress Note: David C. Nielsen, MD 12/01/2010

Note generated by eClinicalWorks EMR/PM Software (www.eClinicalWorks.com)



SALES, TRACY W

52 Y old Female, DOB: 05/24/1958
4154 TICONDEROGA, BOISE, ID-83706

Home: 208-559-2733

Guarantor: SALES, TRACY W

Insurance: PACIFICSOURCE HEALTH (S)

PCP: David C Nielsen, MD Referring: David C Nielsen, MD

11/16/2010

Mary Mcbane, PA

Reason for Appointment

1. right-TOE NAIL FUNGUS

History of Present Illness

General Notes:

History Tracy presents with concerns of a fungal infection in right great toe. Toe is slightly painful and swollen. Denies trauma, fever/chills, drainage. She has had a recent pedicure.

Current Medications

clobetasol topical 0.05% as directed BID
Antioxidant Formula 1 tab(s) once a day
Bone Builder OTC 1 tab BID
vitally as directed daily

Past Medical History

Asthma
Psoriasis
Hemorrhoids
Fatigue
Esophageal reflux
Eczema
MVP without regurg
h/o motorcycle accident with LOC coma amnesia
sinusitis Dr AC Jones
Allergic rhinitis

Social History

Smoking: yes, 3 cigs per day. Has quit before..
Alcohol: socially, Type: , Frequency: , Years: , Determination:..
no Recreational drug use.

Allergies

N.K.D.A.

Review of Systems

See HPI.

Vital Signs

BP 116/84, HR 64.

Examination

Brief Examination:

GENERAL APPEARANCE: NAD, pleasant. EXTREMITIES: R foot: no edema, DP pulses 4/4 , great toe mildly tender along medial border, with erythema, no fluctuance or pustules, nail is well attached, not particularly

Patient: SALES, TRACY W DOB: [REDACTED] Progress Note: Mary Mcbane, PA 11/16/2010

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thickened, no debris.

Assessments

1. Paronychia of toe - 681.11 (Primary)

Treatment

1. Paronychia of toe

Start cephalexin tablet, monohydrate 500 mg, orally, 28, 1 tab(s), twice per day, Refills 0

Patient advised to apply moist heat packs to 2-3 times per day for 10-15 minutes at a time. Patient is to call if symptoms worsen, do not resolve or any other concerns.

Follow Up

as scheduled, prn

Mary Mebane PA

Electronically signed by Mary Mebane PA on 12/05/2010 at 12:43 PM MST

Sign off status: Completed

SLIM ParkCenter Office
701 E ParkCenter Blvd
Boise, ID 83706
Tel: 208-381-6400
Fax: 208-381-6450

Patient: SALES, TRACY W DOB: [REDACTED] Progress Note: Mary Mebane, PA 11/16/2010

Note generated by eClinicalWorks EMR/PM Software (www.eClinicalWorks.com)

Patient: SALES, TRACY W
DOB: [REDACTED] Age: 52 Y Sex: Female
Phone: 208-336-9022
Address: 4154 TICONDEROGA, BOISE, ID-83706
Pcp: David C Nielsen, MD

Provider: Dave McDermott, PA-C
Date: 10/11/2010

Subjective:**CC:**

1. Toe fungus; ? infected toenail.

HPI:**General Notes:**

Tracy is here for concerns of mild fungus of her right great toe. For the past 16 months of noticed thickening and separation of the nail from the foot. There is no pain, redness or tenderness with this. She did injure the toes and dropped a book on them sometime ago. She has no history of other skin or foot problems. Further review is negative.

Medical History: Asthma, Psoriasis, Hemorrhoids, Fatigue, Esophageal reflux, Eczema, MVP without regurg, h/o motorcycle accident with LOC coma amnesia, sinusitis Dr AC Jones, Allergic rhinitis.

Family History:**Social History:**

Medications: clobetasol topical 0.05% as directed BID, Antioxidant Formula 1 tab(s) once a day, Bone Builder OTC 1 tab BID, vitality as directed daily

Allergies:**Objective:**

Vitals: Ht b, BP 157/97, HR 88, Temp 97.4, Oxygen sat % 98/RA, Pain Scale 1.

Past Orders:**Examination:**Brief Examination:

GENERAL APPEARANCE: pleasant, NAD, vitals as noted.. EXTREMITIES: no edema, no cyanosis, no clubbing. PERIPHERAL PULSES: 2+ bilaterally at the lower extremities.. SKIN: High-grade toenail with thickening and separation from the base of the nail consistent with onychomycosis/onycholysis..

Assessment:**Assessment:**

1. Onychomycosis - 110.1 (Primary), History and exam consistent with onychomycosis. She did have previous injury as well and likely to lose the nail. We discussed treatment options and she will use of Vicks ointment on this for the next 8-12 months. We discussed and reassured no other worrisome infectious process. Should she develop redness, pain or worsening symptoms she will notify us.

Plan:**Immunizations:****Labs:****Preventive:**

Patient: SALES, TRACY W DOB: 05/24/1958 Sex: Female
Encounter Date: 10/11/2010

Note generated by eClinicalWorks EMR/PM Software (www.eClinicalWorks.com)

Follow Up: prn

Provider: Dave McDermott, PA-C

Patient: SALES, TRACY W DOB [REDACTED] **Date:** 10/11/2010



Electronically signed by Dave McDermott PA-C on 10/14/2010 at 03:41 PM MDT
Sign off status: Completed

Patient: SALES, TRACY W DOB [REDACTED] **Sex:** Female
Encounter Date: 10/11/2010

Note generated by eClinicalWorks EMR/PM Software (www.eClinicalWorks.com)

**Sawtooth Epidemiology
and Infectious
Diseases**



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FAX: 208-336-4027

December 14, 2010

David Nielsen, M.D. 706-8001

RE: Sales, Tracy

Dear David,

I had the pleasure of seeing Tracy in the office for evaluation. She is a pleasant 52-year-old female who last spring in April had a pedicure. She developed a little bit of irritation on that toe subsequent to that. That has never really completely gone away. It was not all that painful and she was able to get around and do things through the summer months. However, in October, the toe became a bit more painful and swollen and she stated that the nail looked like it had some green stuff underneath it. She was seen in the outpatient arena and was diagnosed with a toenail fungus. She was offered the option of what I suppose was probably itraconazole versus topical therapy with what she states was Vicks VapoRub. I believe she chose to use the Vicks, but went on to have progressive discomfort. The nail lifted up and she was able to pull most of it off herself. She states it was not painful when she did that, but underneath the nail itself, there was sort of cottage cheese-like material, it sounds to me like some purulence. She has gone on to develop progressive erythema and swelling of the toe and it clearly is twice the size of the other foot. She has not had fevers, chills, or sweats. She has had no drainage or open wounds. There has been no lymphangitis over the dorsum of the foot. She is not diabetic, has really has no other major medical issues. X-rays were obtained. It shows erosion of the distal tuft. Per our discussion about two weeks ago, we wanted to have a PICC line placed and to start her on IV antibiotics. Prior to this, she had been on a couple of weeks of oral Keflex with no significant response. She has now been on IV Rocephin for two weeks and again she has had no improvement. She actually thinks the toe was a bit more painful. Last week, she had vancomycin added in at 800 mg once per day. Her vanco trough is undetectable.

Sales, Tracy
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She has no open sores this time and certainly no plantar ulcerations. I do not believe she takes any medicines on a regular basis. She is on number of over-the-counter supplements. She has had a nares swab that is negative for MRSA. She carries an antecedent history of asthma, psoriasis, reflux disease, eczema, and mitral valve prolapse. She occasionally has issues with sinusitis.

Her family history is uncertain in that she does not have great contact with her parents. She states her mother may have irritable bowel syndrome. Tracy does have issues with loose stools perhaps three to four days per week, she will typically have two to three loose stools per day on those days. They are not really associated much in the way of severe cramping though she does feel a little bit of discomfort. There is no blood in the stool. She has never been diagnosed with ulcerative colitis or Crohn's.

On examination, again the right great toe was at least twice the size of the left great toe. It is pink. It is tender to touch. The nail was starting to grow back. She has no other joints that are inflamed or bothering her. She has no skin rash today. She is not any medications for psoriasis at this time.

IMPRESSION: Question osteomyelitis versus psoriatic disease versus I guess a remote possibility would be inflammatory bowel disease related arthritis. I tend to actually favor psoriatic disease at this juncture. We will repeat x-rays today. I have asked the outpatient infusion center to discontinue the Rocephin, but we will increase the dose of vancomycin while we collect more data. I will have the radiologist review the x-rays with the specific thought for psoriatic changes and we may ask the rheumatology service to become involved. I will be calling Tracy later today or tomorrow with the results of the x-ray and hopefully we can attenuate her antibiotic therapy.

Sincerely,



Thomas Coffman, M.D.
TC/AK/SV/8877582

P.S. Spoke with Steve Mings and Radiology. I suspect the nail event was a psoriatic process too. She'll be seen by Steve and may get started on MTX or other meds. I'll stop the antibiotics.

Gem State Dermatology
100 Warm Springs Ave
Boise ID 83712
Phone: (208) 424-9101 Fax: (208) 424-5072

Patient: Tracy Sales

Nickname:

DOB: [REDACTED]

Date of Service: 12/16/2010

Patient's Primary Physician:

Guardians if Applicable: ,

Hobbies/Interests

The patient presents today for consultation at the request of Thomas Coffman, M.D.

Chief Complaint (1/1): The patient denies ABCD's, The ABCD's were reviewed and The patient denies a complete skin exam.

Location - Skin: She indicates the problem is located Right foot, first toe.

Duration: Condition has existed Since May.

Associated signs and symptoms - Skin: Patient is experiencing dryness and swelling.

Severity: Severity of condition is worsening.

Misc. notes: Patient has had psoriasis for about 21 years but has had it under control with diet and Clobetasol prn. Patient had toe nail fungus after a pedicure in May, the toe nail got infected and she used antibiotics in October. Condition has continued to get worse and has been going to the hospital for antibiotics through I.V, not responding. Patient has been having flares with her psoriasis for the last few months and was told by her doctor that this may be related.

PCP: Vicks for fungus and Cephlexan for 10 days

Dr. David Nielson IV antibiotic started 2 weeks ago. Neg for MRSA.

Dr. Coffman 14th x-ray normal. Switched her from 800mg to 1500mg IV

Allergies: Patient/Guardian admits allergies to NKDA.

Medication History: Active: supplements (active).

Past Medical History: **Psychiatric Hx:** (+) depression,, (-) alcoholism,, history of psychiatric problems, suicide attempt/thoughts. **Cardiovascular Hx:** (+) High Blood Pressure. (-) artificial valves, chest pain, Heart Attack, heart murmur, high cholesterol, irregular heart beat, pacemaker, phlebitis. **GU Hx:** (+) Yeast infections when taking antibiotics. **Respiratory Hx:** (+) chronic cough, wheezing. (-) Asthma, emphysema, shortness of breath. **Childhood Illnesses:** (+) bronchitis. **Dermatologic Hx:** (+) skin cancer,, Cold Sores or Fever Blisters, skin disease. (-) AK(s), dysplastic nevus, problems healing, Rashes, scars,, skin problems, Sun burns/ blistering,

Sales, Tracy 12/16/2010 - 34858

Marcy Green

and we encouraged her to come in for complete exam and ongoing follow up.

Scheduling: She should return to the office as needed and in one year for follow-up.

Chaperone for the exam: N/A

Note Scribed by: Jaclyn Golus, PA-C.

Prescriptions:

Rx: indomethacin- 25 mg capsule (), Take 1 to 2 by mouth three times a day. Dispense: 180.

Allow Generic: Yes

Rx: clobetasol propionate ointment- 0.05% ointment (), Apply ointment to skin twice a day for 2 weeks.. Dispense: 60g. Allow Generic: Yes

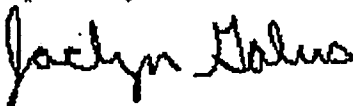
Signed by



Steven Mings, MD

Digital Signature on 12/16/2010 at 9:34:54 AM by: Steven Mings, MD

Updated by



Jaclyn Golus, PA-C

Digital Signature on 12/23/2010 at 8:40:10 AM by: Jaclyn Golus, PA-C

Updated by _____ Marcy Green

EXHIBIT C

000164

<p>IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA</p> <p>TRACY SALES, individually, Plaintiff, vs. STACIE PEABODY, individually and doing business under the assumed name of FINGERPRINTS DAY SPA; and LINDA COOK, individually, Defendants.</p> <p>Case No. CV PI 1206516 VOLUME I</p> <p>DEPOSITION OF TRACY SALES JANUARY 29, 2013</p> <p>REPORTED BY: MONICA M. ARCHULETA, CSR NO. 471 NOTARY PUBLIC</p>	<p>3</p> <p>1 APPEARANCES: 2 For the Defendant Cook: 3 BAUER & FRENCH 4 BY: MS. MARGALIT Z. RYAN 5 1501 Tyrell Lane 6 P.O. Box 2730 7 Boise, Idaho 83701</p> <p>8 9 ALSO PRESENT: Linda Cook</p> <p>10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>
<p>2</p> <p>1 THE DEPOSITION OF TRACY SALES was taken on 2 behalf of the Defendants Stacie Peabody and Fingerprints 3 Day Spa at the offices of Carey Perkins, 300 North 6th 4 Street, Suite 200, Boise, Idaho, commencing at 9:45 a.m. 5 on January 29, 2013, before Monica M. Archuleta, 6 Certified Shorthand Reporter and Notary Public within 7 and for the State of Idaho, in the above-entitled 8 matter.</p> <p>9 10 APPEARANCES: 11 For the Plaintiff: 12 JACOBSON & JACOBSON, PLLC 13 BY: MR. JAMES F. JACOBSON 14 660 E. Franklin Road, Suite 110 15 Meridian, Idaho 83642</p> <p>16 17 For the Defendants Stacie Peabody and Fingerprints 18 Day Spa: 19 CAREY PERKINS, LLP 20 BY: MS. AMY ZAVIDOW 21 MR. TRACY L. WRIGHT 22 Capitol Park Plaza 23 300 North 6th Street, Suite 200 24 P.O. Box 519 25 Boise, Idaho 83701</p>	<p>4</p> <p>1 INDEX 2 TESTIMONY OF TRACY SALES: PAGE 3 Examination by Ms. Zavidow 5 4 5 6 EXHIBITS 7 1. Notice of Taking Deposition Duces Tecum 7 8 2. David C. Nielsen, M.D., Summary View - 89 9 10/11/2010 10 3. Letter to David Nielsen, M.D. dated 100 11 December 14, 2010 from Thomas Coffman, M.D. 12 4. David C. Nielsen, M.D. - Patient Summary 107 13 5. Letter to John Ader, DO, dated November 30, 116 14 2011 from Casi M. Wyatt, DO 15 6. John T. Ader, DO Progress Notes dated 119 16 12/19/2011 17 18 19 20 21 22 23 24 25</p>

5	7
1 TRACY SALES,	1 before we take a break. Okay?
2 first duly sworn to tell the truth relating to said	2 A. Yes.
3 cause, testified as follows:	3 Q. Ms. Sales, is today a good day for your
4	4 deposition?
5 EXAMINATION	5 A. Yes.
6 QUESTIONS BY MS. ZAVIDOW:	6 Q. Are you presently on any medications which
7 Q. Ms. Sales, my name is Amy Zavidow. And I'm	7 would in any way impair your ability to give truthful,
8 one of the attorneys representing Ms. Peabody and	8 complete, and honest answers here today?
9 Fingerprints Day Spa in this matter. Will you please	9 A. No.
10 state your full name for the record?	10 Q. Did you receive the notice of this deposition?
11 A. Tracy Weiser Sales.	11 A. Yes.
12 Q. May I call you Ms. Sales?	12 Q. I have here the notice for the deposition. I
13 A. Please.	13 would like to enter it as Exhibit 1.
14 Q. Let the record reflect that this is the time	14 (Exhibit 1 marked.)
15 and place set for the taking of the deposition of Tracy	15 Q. (BY MS. ZAVIDOW) Will you please look at
16 Sales pursuant to notice and the Idaho Rules of Civil	16 Exhibit 1 and tell me if it looks familiar to you?
17 Procedure. Ms. Sales, have you ever had your deposition	17 A. This being Exhibit 1?
18 taken before?	18 Q. Yes. The notice being Exhibit 1.
19 A. No.	19 A. Yes, it does.
20 Q. Ms. Sales, do you understand that your	20 Q. You have seen it before?
21 testimony here today is under oath?	21 A. Yes, I have.
22 A. Yes, I do.	22 Q. Have you brought anything with you here today?
23 Q. By swearing to tell the truth I need you to	23 A. No, I have not. As far as any material?
24 acknowledge that you understand that the testimony you	24 Q. Any materials.
25 are giving here today is the same as if you were	25 A. I personally have not; no.
6	8
1 testifying in front of a court. And if you fail to give	1 Q. Other than the communications you may have had
2 truthful answers adverse consequences may result.	2 with your counsel what have you done to prepare for the
3 A. Yes.	3 deposition today?
4 Q. So you acknowledge and understand that fact?	4 A. Specifically just with my counsel.
5 A. Yes, I do.	5 Q. For example, have you reviewed any medical
6 Q. Thank you. Everything you say here today will	6 records?
7 be taken down verbatim by the court reporter. In order	7 A. When I was with my counsel.
8 for her to do that effectively it is important that you	8 Q. When you visited with your counsel you did
9 and I don't talk over one another. I would ask that you	9 review medical records. Okay. Which ones did you
10 allow me to finish asking my question before you	10 review? Not your communications, but which medical
11 respond. And I will extend the same courtesy to you.	11 records did you review?
12 Also, every answer must be verbal. Meaning, that you	12 MR. JACOBSON: I think that falls within the
13 cannot respond by nodding or shaking your head because	13 parameter of attorney-client privilege. I don't know
14 that will not be clear to the court reporter. Please	14 how you divorce our communications with what we
15 also say "yes" or "no" rather than "um-hmm," because it	15 reviewed.
16 may not be clear what you mean. If you don't understand	16 Q. (BY MS. ZAVIDOW) Other than with your lawyer
17 my question to you please let me know and I will do my	17 have you discussed your testimony here today with anyone
18 best to rephrase my question. If you answer my question	18 else?
19 I will assume that you understood it. Does that make	19 A. No, I have not.
20 sense?	20 Q. Now we are going to go through the notice of
21 A. Yes, it does.	21 deposition duces tecum in order to determine whether
22 Q. The deposition might take some time, so if you	22 there are any records that are still outstanding that
23 need to take a break during the examination just let me	23 need to be turned over. In this case we are asking for
24 know and we can take a break. I only ask that if I have	24 medical history records. So these are memoranda,
25 a question pending an answer you go ahead and answer	25 histories, medical charts, office records for any

<p style="text-align: right;">9</p> <p>1 discomfort, disfigurement or disability sustained prior 2 or subsequent to the incident which forms the basis of 3 this lawsuit. 4 You have not brought any medical records with 5 you here today; is that correct? 6 A. I have not brought any documentation with me; 7 no. 8 Q. We are also asking for any document not 9 previously produced which supports or tends to support 10 any claims or medical expenses, past or future. 11 You have not brought any records with you 12 today; correct? 13 A. I have not brought any records with me today. 14 MR. JACOBSON: Counsel, sorry if I might be 15 interrupting. There are some additional medical records 16 and bills that we are in the process of obtaining and 17 compiling. 18 MS. ZAVIDOW: Okay. 19 MR. JACOBSON: They are not the bulk of what 20 is there. You have the bulk of what is there. There 21 are some stragglers, if I could call them that. To the 22 extent that we haven't produced something we'll 23 stipulate to leaving the deposition open as to materials 24 not previously produced. 25 MS. RYAN: Could you identify the medical</p>	<p style="text-align: right;">11</p> <p>1 income and lost wages we are not making that claim. To 2 the extent that it falls beyond that outside of that 3 scope I think you have everything that we have that 4 exists that we know of. 5 MS. ZAVIDOW: Okay. 6 Q. (BY MS. ZAVIDOW) Now, I'm going to ask you 7 some questions today that may seem mundane and boring, 8 but they may be of interest to this case. Okay? 9 A. Yes. 10 Q. Thank you. And just to note for the record. 11 In the event there are issues either during this 12 deposition or in subsequent discovery involving 13 documents that are medical records we reserve the right 14 to continue this deposition. 15 What is your current address? 16 A. 4154 South Ticonderoga Way, Boise, Idaho 17 83706. 18 Q. How long have you lived there? 19 A. It will be -- excuse me, I have to count. 20 Nineteen years this October. 21 Q. Do you rent or own the place where you live? 22 A. We own it. 23 Q. How long have you owned it? 24 A. I do not know the exact years. 25 Q. Who currently lives there with you at that</p>
<p style="text-align: right;">10</p> <p>1 records and bills that you are in the process of 2 obtaining? 3 MR. JACOBSON: I can't off the top of my head; 4 no. 5 MS. RYAN: Thank you. 6 MS. ZAVIDOW: We are also interested in 7 records that document lost wages if that is a claim you 8 are pursuing. 9 MR. JACOBSON: And I figured that you would 10 get into this. Since we are right here we might as well 11 just say at this point we are not pursuing a claim for 12 lost wages or income. That might short circuit some 13 questioning later on. 14 MS. ZAVIDOW: Okay. 15 Q. (BY MS. ZAVIDOW) So you will produce medical 16 records and you have had a chance to review the notice 17 of deposition duces tecum and have not recognized any 18 other records that need to be turned over? 19 A. I am relying on my counsel for guidance in 20 that area. 21 Q. Particularly, we are looking for any 22 schedules, or calendars, or diaries that record visits 23 to various locations that you do sales presentations? 24 MR. JACOBSON: Well, to the extent that that 25 falls within what you are looking for in terms of lost</p>	<p style="text-align: right;">12</p> <p>1 address? 2 A. My husband and my youngest son. 3 Q. Has anyone lived there with you since 4 April 19, 2010? 5 A. No. They have not lived there. 6 Q. To clarify. They stopped living there before 7 April 19, 2010? Or do -- your husband and your son 8 currently live there; correct? 9 A. Correct. 10 Q. Did they live there before April 19, 2010? 11 A. Yes, they did. 12 Q. Prior to your current address where did you 13 live? 14 A. We lived on Rachel Circle in southeast Boise. 15 Q. How long did you live there? 16 A. I don't recall exactly the number of years. 17 And I don't want to speculate. 18 Q. Did you live alone or with somebody? 19 A. I lived with my husband and my two sons. 20 Q. At the time that you lived on Rachel Circle? 21 A. That is correct. 22 Q. Have you lived in any other states other than 23 Idaho? 24 A. California. 25 Q. Where?</p>

<p style="text-align: right;">13</p> <p>1 A. In Covina, California and in Hollywood, 2 California. 3 Q. How long did you live in Covina? 4 A. Fourteen years. 5 Q. How long in Hollywood? 6 A. Eight years. 7 Q. When did you move to Idaho? 8 A. We moved to Idaho in May -- I want to be exact 9 with the year. 10 Q. You can give a range if that makes you more 11 comfortable. 12 A. It would have been May of 1985, I believe. 13 Q. How old are you? 14 A. I am 54. 15 Q. What is your date of birth? 16 A. [REDACTED] 17 Q. Have you ever had any other Social Security 18 numbers other than the one that you have now which we 19 have in your medical records? 20 A. No, I have not. 21 Q. Have you ever used any other names? 22 A. My maiden name. Tracy Allison Weiser. 23 Q. Have you ever served in the military. 24 A. I need to state another name. My previous 25 marriage, Tracy Weiser Call.</p>	<p style="text-align: right;">15</p> <p>1 A. Joel Sales. 2 Q. When were you married? 3 A. On September 29, 1990. 4 Q. How long have you been married? 5 A. Twenty-five years. Excuse me. I stand 6 corrected. Twenty-three in September. 7 Q. Where did you get married? 8 A. Here in Boise, Idaho. 9 Q. What does your husband do for work? 10 A. He manages property for his parents business 11 in Iowa. 12 Q. He manages it from Boise? 13 A. Yes. For the most part, yes. 14 Q. Have you been married before? 15 A. Yes, I have. 16 Q. When? 17 A. It was June 1, 1979. 18 Q. How long were you married? 19 A. We were married approximately -- right around 20 four years. 21 Q. What was the name of your prior husband? 22 A. His name is Val Dean Call. 23 Q. Where did you get married? 24 A. With Val Dean? 25 Q. Yes.</p>
<p style="text-align: right;">14</p> <p>1 Q. Have you ever served in the military? 2 A. No, I have not. 3 Q. Ms. Sales, are your parents still living? 4 A. My father is. 5 Q. What is your father's name? 6 A. James Weiser. 7 Q. Where does he live? 8 A. Here in Boise, Idaho. 9 Q. Is he married? 10 A. He is not. 11 Q. What was your mother's name? 12 A. Patricia. 13 Q. Where did she live? 14 A. Covina, California. 15 Q. When did she pass? 16 A. May 2, 2012. 17 Q. Ms. Sales, are you married? 18 A. Yes, I am. 19 Q. What is your husband's name? 20 A. Joel. 21 Q. If you would like to take a break, please feel 22 free. 23 MR. JACOBSON: We will be right back. 24 (Recess.) 25 Q. (BY MS. ZAVIDOW) What is your husband's name?</p>	<p style="text-align: right;">16</p> <p>1 A. In Las Vegas, Nevada. 2 Q. Where does Mr. Call live? 3 A. I do not know. 4 Q. When did you get divorced? 5 A. In 1985. 6 Q. Where were you living at the time you were 7 divorced? 8 A. I moved to Boise, Idaho. 9 Q. Have we covered all marriages? 10 A. Yes. 11 Q. Do you have any living siblings? 12 A. I do. 13 Q. What are their names? 14 A. A brother, Dana Weiser. Another brother, 15 Conrad Weiser. And I have a half-sister, Wendy Dunning. 16 Q. How do you spell Dunning? 17 A. D-u-n-n-i-n-g. 18 Q. How old is Dana Weiser? 19 A. Dana is 58. 20 Q. How old is Conrad Weiser? 21 A. Fifty-one. 22 Q. How old is Wendy Dunning? 23 A. I believe she is 64. Maybe 65. 24 Q. Where does Dana live? 25 A. Manhattan Beach, California.</p>

<p style="text-align: right;">17</p> <p>1 Q. Where does Conrad live?</p> <p>2 A. Covina, California.</p> <p>3 Q. Where does Wendy live?</p> <p>4 A. It's in Colorado outside of Denver. I'm not</p> <p>5 sure of the exact city.</p> <p>6 Q. What does Dana do?</p> <p>7 A. He works for Southern California Edison.</p> <p>8 Q. How about Conrad?</p> <p>9 A. I'm not sure. He's in the process of looking</p> <p>10 for employment.</p> <p>11 Q. And Wendy?</p> <p>12 A. They have been horse owners and operators.</p> <p>13 And she worked for the postal. I believe she is</p> <p>14 retired. But I do not know for sure.</p> <p>15 Q. Do you have any children?</p> <p>16 A. I do.</p> <p>17 Q. How many children?</p> <p>18 A. I have two.</p> <p>19 Q. And what are their names?</p> <p>20 A. Kyle Sales and Erik Sales.</p> <p>21 Q. Did you have these children with your current</p> <p>22 husband?</p> <p>23 A. Erik is with Joel.</p> <p>24 Q. Who is Kyle's father?</p> <p>25 A. Val Dean.</p>	<p style="text-align: right;">19</p> <p>1 Q. Did you graduate?</p> <p>2 A. I did. It is non-accredited. But I did</p> <p>3 receive a bachelor's.</p> <p>4 Q. When did you graduate?</p> <p>5 A. 1978.</p> <p>6 Q. Any other formal education from any source?</p> <p>7 A. No.</p> <p>8 Q. Any other classes that you took that might</p> <p>9 have been required for work?</p> <p>10 A. When I worked for Albertsons I took some</p> <p>11 inhouse training. Nothing at an academy or anything.</p> <p>12 Q. What kind of inhouse training?</p> <p>13 A. On operations on the computer, and CAD</p> <p>14 operator, and various aspects of different jobs that I</p> <p>15 had done with my time with Albertsons.</p> <p>16 Q. Do you currently have a driver's license?</p> <p>17 A. Yes, I do.</p> <p>18 Q. Do you have it with you here today?</p> <p>19 A. Yes, I do.</p> <p>20 Q. Have you ever had any licenses from any state</p> <p>21 to engage in activity beyond driving? For example, a</p> <p>22 license to sell insurance?</p> <p>23 A. Not that I recall. I would have to check to</p> <p>24 be absolutely sure. But I have had a California</p> <p>25 driver's license.</p>
<p style="text-align: right;">18</p> <p>1 Q. What are their ages?</p> <p>2 A. Erik is 22. And Kyle is 31.</p> <p>3 Q. Do they reside with you?</p> <p>4 A. Erik does.</p> <p>5 Q. Where does Kyle reside?</p> <p>6 A. In Seattle, Washington.</p> <p>7 Q. Did you complete high school?</p> <p>8 A. I did.</p> <p>9 Q. Where?</p> <p>10 A. In California.</p> <p>11 Q. When?</p> <p>12 A. In 1976.</p> <p>13 Q. Did you have any formal education after high</p> <p>14 school?</p> <p>15 A. Two years.</p> <p>16 Q. Where?</p> <p>17 A. American National Institute.</p> <p>18 Q. Where is that?</p> <p>19 A. Aurora, California. No, excuse me. Agoura.</p> <p>20 Q. What did you study?</p> <p>21 A. Metaphysics. Health science.</p> <p>22 Q. And you said that was for two years?</p> <p>23 A. Yes, it was.</p> <p>24 Q. Was it a two-year program?</p> <p>25 A. It was. Yes.</p>	<p style="text-align: right;">20</p> <p>1 Q. For example, I understand that you are an</p> <p>2 independent business professional. Do you have a</p> <p>3 license for that?</p> <p>4 A. No. It is independent sales.</p> <p>5 Q. Do you belong to any association or trade</p> <p>6 group associated with any job or training?</p> <p>7 A. No, I do not.</p> <p>8 Q. Ms. Sales, I need to cover your employment</p> <p>9 history. I would like you to start with the first job</p> <p>10 you had out of high school through to the present time?</p> <p>11 A. This is deep. I'm not sure of the order. I</p> <p>12 don't recall exactly. But I was an assistant manager</p> <p>13 for Fox Photo-Hallmark on Wilshire Boulevard in Las</p> <p>14 Angeles. I worked for Allianz Insurance Company on</p> <p>15 Wilshire Boulevard in Las Angeles. Before that I worked</p> <p>16 in sales at Fred Segal Clothing Company on Crescent</p> <p>17 Heights in Melrose, I believe. And I worked for Denny's</p> <p>18 Restaurant for a little over five years. I was an</p> <p>19 assistant manager for McDonald's in Chino, California.</p> <p>20 I worked at Cocoa's Restaurant in Ontario, California.</p> <p>21 And I also worked at Butterfield Stage in Ontario,</p> <p>22 California. Or Chino. I also worked for The Lone Star</p> <p>23 in -- I don't recall the name of the town. But it was</p> <p>24 relatively close. It wasn't Chino, but it was maybe</p> <p>25 Upland. Then I came here and I worked for Laramie</p>

<p style="text-align: right;">21</p> <p>1 Foundation. It was Hennessy's at the top, Crystal 2 Ballroom Catering, and there was also a restaurant they 3 owned in the basement. I don't remember the name of it. 4 I worked for Miller Stephen Hyundai. 5 Q. Can you spell that? 6 A. M-i-l-l-e-r S-t-e-p-h-e-n H-y-u-n-d-a-i. And 7 I worked for Albertsons almost 16 years. I also after 8 that did -- worked in store sets. I do not remember the 9 name of the company I was working with. And I owned my 10 own cleaning business. And I am now an independent 11 distributor with Nu Skin Pharmanex. 12 Q. What were your job duties when you worked as 13 an assistant manager for Fox Photo? 14 A. It was a combination Photo Star store and 15 Hallmark. So we did inventory in sets. Took in film 16 development at that time. Ran the ledgers and recording 17 the operations of the store. 18 Q. Were you exposed to chemicals when you worked 19 there? 20 A. No. We sent everything out. 21 Q. What did you do at Albertsons? 22 A. Multiple. A majority of it was accounting. I 23 started off actually as a checker at their store in The 24 Max. And then I moved to their corporate offices. And 25 I worked in accounts payable I believe for about eight</p>	<p style="text-align: right;">23</p> <p>1 in the transition of closing down my cleaning business 2 when this incident occurred. But I had pretty much 3 closed that off. I don't recall the exact date. 4 Q. And when did you start back up? 5 A. I believe, and I'm not absolute, in November 6 of 2012. 7 Q. Who were your clients for your cleaning 8 business? 9 A. I don't recall all of them. 10 Q. How many did you have? 11 A. Probably 18. As a guess. 12 Q. Does that mean that you cleaned 18 homes? 13 A. That is what I'm saying, yes. 14 Q. How many would you have at one time? 15 A. Normally it was two a day Monday through 16 Thursday. And one on Friday. 17 Q. When did you start the cleaning business? 18 A. I don't know exactly. I would have to go back 19 and look. 20 Q. Do you have records? 21 A. I do. 22 MS. ZAVIDOW: We would request those records. 23 MR. JACOBSON: All records relating to her 24 cleaning business? 25 MS. ZAVIDOW: Records relating to the time in</p>
<p style="text-align: right;">22</p> <p>1 years. Also worked in -- did some moonlighting at the 2 same time in retail reporting. Accounts receivable. 3 Pharmacy receivable. Distribution accounting. Then 4 transferred over to their design -- new and remodel 5 store development. 6 Q. When you did store sets what does that mean? 7 A. Where you go into a store and you change -- 8 like in the aisles when you see the product on the 9 shelves and the end sets. So they change out their 10 product and do inventories. 11 Q. Did that require lifting objects? 12 A. We weren't allowed to lift heavy objects; no. 13 Q. What did you do in your cleaning business? 14 A. I only have two clients that I am working on 15 right now. And all I do is basic housecleaning. 16 Floors, vacuum, dust, clean the bathrooms, kitchen. 17 Same as you would do in your own home. 18 Q. You do it yourself? 19 A. Yes, I do. 20 Q. You do it at present? 21 A. I do. 22 Q. Was there a time that you didn't do it? 23 A. Yes. 24 Q. When was that time? 25 A. Well, when I was undergoing -- actually, I was</p>	<p style="text-align: right;">24</p> <p>1 which she started. Approximate time. 2 Q. (BY MS. ZAVIDOW) Can you approximate a time 3 you started your cleaning business? 4 A. I would rather not guess. 5 Q. Did you have any employees? 6 A. No. 7 Q. Did you ever have any employees? 8 A. No. 9 Q. What kind of cleaning did you do? 10 A. Housecleaning. Like you would clean your 11 house. 12 Q. Did it involve crouching? 13 A. If you had to bend over. 14 Q. I would like to talk about Nu Skin. When did 15 you start working as an independent distributor? 16 A. Approximately -- and I would have to check to 17 be absolute. I want to say three to three-and-a-half 18 years ago. 19 Q. How did you start? 20 A. I actually was a product user at first. And 21 it just ended up people liked the results they saw. So 22 I eased into that. 23 Q. What kind of products do you use? 24 A. Just skin care products. And the supplement 25 line.</p>

<p style="text-align: right;">25</p> <p>1 Q. Are you still an independent distributor?</p> <p>2 A. Yes.</p> <p>3 Q. Are there ranks? How does it work?</p> <p>4 A. You can be a product user. You can go into it</p> <p>5 as a business. You can become -- there are different</p> <p>6 levels that you can reach. Depending on the teams that</p> <p>7 you build. And distributors that you bring in. It is</p> <p>8 their independent business, as well. So it is just a</p> <p>9 training process where it is somewhat like a franchise</p> <p>10 operation.</p> <p>11 Q. How are you paid?</p> <p>12 A. Through what I sell. And any team members</p> <p>13 underneath. By the company.</p> <p>14 Q. When you say team members. Do you mean people</p> <p>15 below you in terms of the distribution chain?</p> <p>16 A. Yes. If they are going for the same</p> <p>17 achievements. You can have distributors underneath you</p> <p>18 that don't desire to build the business.</p> <p>19 Q. To clarify, would you then be taking their</p> <p>20 business because they are not as interested in building</p> <p>21 the business?</p> <p>22 A. I would never -- if they are not going to</p> <p>23 build the business then they don't build a business. It</p> <p>24 is not a matter of taking.</p> <p>25 Q. When you started three or three-and-a-half</p>	<p style="text-align: right;">27</p> <p>1 A. I order it.</p> <p>2 Q. So you contact Nu Skin and you order new</p> <p>3 product; is that correct?</p> <p>4 A. Yes.</p> <p>5 Q. And they send it to you?</p> <p>6 A. Yes.</p> <p>7 Q. How do you get customers?</p> <p>8 A. Just talk to people. Sometimes people are</p> <p>9 referred to me.</p> <p>10 Q. Who refers them to you?</p> <p>11 A. Just people that are happy with what they are</p> <p>12 doing.</p> <p>13 Q. Are those other customers of yours?</p> <p>14 A. They can be.</p> <p>15 Q. Do customers who refer people get benefits?</p> <p>16 A. If somebody ends up, for example, buying like</p> <p>17 a Spa, they will get usually like a \$50 bonus check from</p> <p>18 the company as a referral. It used to be \$50. I don't</p> <p>19 know what it is now.</p> <p>20 Q. Do you go to sales meetings?</p> <p>21 A. We go to like business reviews; yes.</p> <p>22 Q. How often are those?</p> <p>23 A. Once a week.</p> <p>24 Q. Do you go every week?</p> <p>25 A. For the most part.</p>
<p style="text-align: right;">26</p> <p>1 years ago, how did you start? You received products</p> <p>2 from the company and sold them. Who did you sell them</p> <p>3 to?</p> <p>4 A. That would be a preferred customer. I have no</p> <p>5 idea. There is many people that are just product users.</p> <p>6 Q. What percentage of your customers are</p> <p>7 individuals?</p> <p>8 A. Every one of them. I'm not clear about your</p> <p>9 question.</p> <p>10 Q. Do you sell to salons?</p> <p>11 A. No. I could if I chose to.</p> <p>12 Q. Do other Nu Skin representatives sell to</p> <p>13 salons?</p> <p>14 A. I'm sure there probably are some. I don't</p> <p>15 know exactly.</p> <p>16 Q. Do you sell to any businesses?</p> <p>17 A. No, I do not. Again, it is an independent</p> <p>18 situation.</p> <p>19 Q. What share goes back to Nu Skin?</p> <p>20 A. I don't know exactly. I believe that they pay</p> <p>21 out about -- I believe. And I don't want to be held</p> <p>22 exact. Because I'm not -- I guess I'll just wait to</p> <p>23 answer that. Because I don't want to give you an</p> <p>24 incorrect answer.</p> <p>25 Q. How do you get new product from Nu Skin?</p>	<p style="text-align: right;">28</p> <p>1 Q. How long have you gone to those business</p> <p>2 reviews?</p> <p>3 A. I would have to check. But I'm going to</p> <p>4 say -- I would like to come back on that. Because I</p> <p>5 want to be exact on the year.</p> <p>6 Q. Do you work with people to sell product? Or</p> <p>7 do you work independently all of the time?</p> <p>8 A. It's independent always.</p> <p>9 Q. Do you know other Nu Skin representatives?</p> <p>10 A. Yes, I do.</p> <p>11 Q. Do you see them all of the time?</p> <p>12 A. No. Not all of the time.</p> <p>13 Q. How do you usually see them?</p> <p>14 A. Just out in public or at events. There is</p> <p>15 over 800,000 of them.</p> <p>16 Q. Do you have friendly relationships with any of</p> <p>17 them?</p> <p>18 A. A majority of them.</p> <p>19 MR. WRIGHT: Can we take five?</p> <p>20 MR. JACOBSON: Sure.</p> <p>21 (Recess.)</p> <p>22 Q. (BY MS. ZAVIDOW) Returning to the cleaning</p> <p>23 business. Did you have a name for it?</p> <p>24 A. Just Tracy's Cleaning.</p> <p>25 Q. And I know that you said you didn't remember</p>

<p style="text-align: right;">29</p> <p>1 exactly when it started. Can you approximate?</p> <p>2 A. I'm going to say approximately four years ago.</p> <p>3 Maybe four-and-a-half. Somewhere between four and five.</p> <p>4 Q. So that is 2008? 2009? Four to</p> <p>5 four-and-a-half years ago?</p> <p>6 A. Yeah. Approximately.</p> <p>7 Q. How did you start the cleaning business? How</p> <p>8 you get into it?</p> <p>9 A. I had been downsized from Albertsons. And I</p> <p>10 needed to do something. I didn't want to go back into</p> <p>11 corporate. And I knew there was a need. People have a</p> <p>12 need for cleaning and don't have the time. So I started</p> <p>13 cleaning.</p> <p>14 Q. Did you have any prior experience cleaning</p> <p>15 other people's houses?</p> <p>16 A. Other people's?</p> <p>17 Q. Yes.</p> <p>18 A. Family members. Nothing public-wise.</p> <p>19 Q. When you started how did you get clients?</p> <p>20 A. It was all referral.</p> <p>21 Q. How did you get your first client?</p> <p>22 A. Soccer team.</p> <p>23 Q. What was the maximum number of clients you had</p> <p>24 at any one time?</p> <p>25 A. I can't say for sure. I'm going to</p>	<p style="text-align: right;">31</p> <p>1 A. Because I was tired of cleaning and I wanted</p> <p>2 to start building my Nu Skin.</p> <p>3 Q. What happened to the rest of your clients?</p> <p>4 A. I just told them -- gave them notice I wasn't</p> <p>5 going to be cleaning anymore.</p> <p>6 Q. At the time that you transitioned out how many</p> <p>7 clients did you have?</p> <p>8 A. When I first started, obviously 18. It was</p> <p>9 just a process of, like I said, giving them notice and</p> <p>10 letting them find -- because I'm not going to be</p> <p>11 responsible for whomever is going to be going in their</p> <p>12 home. So I didn't have employees.</p> <p>13 Q. Do you remember the names of any of your</p> <p>14 clients?</p> <p>15 A. Yes, I do.</p> <p>16 Q. Can you give them to me?</p> <p>17 A. Let me see. James and Lori Hayes.</p> <p>18 Jennifer and Terry McIntee. Georgian and Clyde Prugh.</p> <p>19 I have their names all written down at home. Jan</p> <p>20 Kennis. Bill and Ruthann Smith. I would have to go</p> <p>21 back to my list. I'm trying to go through the days and</p> <p>22 who I had.</p> <p>23 Q. Is that it?</p> <p>24 A. No. There were more. If that is necessary I</p> <p>25 can provide that at a later time.</p>
<p style="text-align: right;">30</p> <p>1 approximately guess 18. Steady.</p> <p>2 Q. To clarify. Would that mean that you cleaned</p> <p>3 18 homes in a period of one week?</p> <p>4 A. No. In a month. Usually every two weeks you</p> <p>5 go to a home.</p> <p>6 Q. When was the time period that you had 18</p> <p>7 clients?</p> <p>8 A. I don't know exactly. I would have to go back</p> <p>9 and check my records. When I was in the height of my</p> <p>10 cleaning.</p> <p>11 Q. Was it two years ago? Three years ago?</p> <p>12 A. I don't know exactly.</p> <p>13 Q. Was there a drop in the number of clients that</p> <p>14 you had?</p> <p>15 A. When I decided to transition out of cleaning</p> <p>16 I turned it over to another person.</p> <p>17 Q. Who did you turn it over to?</p> <p>18 A. She only took a couple of clients. Nicole.</p> <p>19 Q. What is Nicole's last name?</p> <p>20 A. Brent.</p> <p>21 Q. B-r-e-n-t?</p> <p>22 A. That's correct.</p> <p>23 Q. Where does she live?</p> <p>24 A. I believe in Kuna now. I'm not sure exactly.</p> <p>25 Q. Why did you decide to transition out?</p>	<p style="text-align: right;">32</p> <p>1 Q. Okay. Going back to Nu Skin. How did you</p> <p>2 start using those products?</p> <p>3 A. I bought them.</p> <p>4 Q. How did you learn about them?</p> <p>5 A. A friend of mine. A person that I used to go</p> <p>6 to church with. He and his wife are Nu Skin</p> <p>7 distributors.</p> <p>8 Q. Can you give me his name?</p> <p>9 A. Keith Gmirkin. And Cheryl Gmirkin.</p> <p>10 Q. Where do they live?</p> <p>11 A. In Boise, Idaho.</p> <p>12 Q. When you first started using the products what</p> <p>13 kind of products did you use?</p> <p>14 A. Skin care. Cleanser, toner, moisturizer.</p> <p>15 Q. How long did you continue using the cleanser,</p> <p>16 toner and moisturizer?</p> <p>17 A. I still do.</p> <p>18 Q. Same products?</p> <p>19 A. It might vary on a couple lines. But it's the</p> <p>20 Nu Skin product line.</p> <p>21 Q. What results did you notice?</p> <p>22 A. Amazing. I will have to show you my picture.</p> <p>23 They are very good. That is why I keep using them.</p> <p>24 Q. Specifically, how does it affect your skin?</p> <p>25 A. It stops and reverses the aging process.</p>

<p style="text-align: right;">33</p> <p>1 Q. Did you ever use other products?</p> <p>2 A. Yes, I did.</p> <p>3 Q. What kind of products?</p> <p>4 A. Basic over-the-counter. The ones you see in</p> <p>5 the drugstore. I have used Mary Kay. Lancome. I have</p> <p>6 used Clinique. Oil of Olay. Depended on where I was in</p> <p>7 the income situation as to what I would be able to</p> <p>8 purchase.</p> <p>9 Q. Were these all facial products?</p> <p>10 A. Moisturizers, yes. Skin care.</p> <p>11 Q. Do you use any body products?</p> <p>12 A. Soap. Lotion.</p> <p>13 Q. What kind of lotion?</p> <p>14 A. Moisturizer.</p> <p>15 Q. Nu Skin?</p> <p>16 A. Yes. And I also use Jergens.</p> <p>17 Q. Really quickly, going back to your cleaning</p> <p>18 business. You said that originally the name was Tracy's</p> <p>19 Cleaning. Did you change the name?</p> <p>20 A. Well, I just had to come up with a name. It</p> <p>21 wasn't very clever. It was something I could remember.</p> <p>22 Tracy's Cleaning. But "no" in answer to your question.</p> <p>23 Q. You said that you decided to transition out.</p> <p>24 And you said that that was shortly before the incident</p> <p>25 at issue in this case.</p>	<p style="text-align: right;">35</p> <p>1 Q. And you are the one that cleans their houses?</p> <p>2 A. I do now. One is a business and one is a</p> <p>3 house. Actually, it is in their house.</p> <p>4 Q. Who are your clients?</p> <p>5 A. Eric and Cindy Pearson. And Vincent Tabor.</p> <p>6 Q. Which one is the business?</p> <p>7 A. It is actually his house. Vincent.</p> <p>8 Q. You clean his house but he runs a business?</p> <p>9 A. He operates his business out of his home. So</p> <p>10 I just clean his business and not his personal.</p> <p>11 Q. How often do you clean?</p> <p>12 A. Once a week for Vincent. And every other</p> <p>13 Tuesday for Cindy and Eric.</p> <p>14 Q. How long does it take you?</p> <p>15 A. Total of seven hours between both.</p> <p>16 Q. Between both clients?</p> <p>17 A. Yes.</p> <p>18 Q. So Eric and Cindy?</p> <p>19 A. Four.</p> <p>20 Q. Four hours.</p> <p>21 A. And Vincent approximately three.</p> <p>22 Q. Going back to Nu Skin. What are the names of</p> <p>23 some of the representatives that you knew?</p> <p>24 A. There is so many. What exactly are you --</p> <p>25 Q. You said you attended sales meetings. Who are</p>
<p style="text-align: right;">34</p> <p>1 A. I don't know the exact date. It was before</p> <p>2 this happened.</p> <p>3 Q. Do you remember the month and the year?</p> <p>4 A. I do not.</p> <p>5 Q. The year?</p> <p>6 A. I do not. To be exact, no, I do not.</p> <p>7 Q. An approximation?</p> <p>8 A. When I started transitioning out of it? It</p> <p>9 had to have been I believe approximately very late 2009</p> <p>10 and starting in 2010. Actually, 2010.</p> <p>11 Q. 2010?</p> <p>12 A. 2010.</p> <p>13 Q. When did you stop all together?</p> <p>14 A. I would say it was definitely in 2010. But I</p> <p>15 don't have the exact date.</p> <p>16 Q. Was it mid 2010?</p> <p>17 A. I don't know to be exact.</p> <p>18 Q. Approximate?</p> <p>19 A. I can't. I'm sorry.</p> <p>20 Q. When did you start up again?</p> <p>21 A. In November 2012.</p> <p>22 Q. And you are doing it now?</p> <p>23 A. Very small; yes.</p> <p>24 Q. How many clients do you have now?</p> <p>25 A. I have two clients.</p>	<p style="text-align: right;">36</p> <p>1 the other people who attended the sales meeting?</p> <p>2 A. Are you talking about our own little group?</p> <p>3 There is over 800,000. I know multiple people in</p> <p>4 different countries doing Nu Skin.</p> <p>5 Q. Okay. Within your small group?</p> <p>6 A. Laura Collister, Deb Hoburg, Janell Okenaka,</p> <p>7 Sheila Lorrar. I am going blank right now. If we can</p> <p>8 come back to that.</p> <p>9 Q. How long have you known Laura Collister?</p> <p>10 A. I would say close to five years.</p> <p>11 Q. Where does she live?</p> <p>12 A. In Meridian.</p> <p>13 Q. How about Deb Hoburg?</p> <p>14 A. I have known since approximately 1991. Maybe</p> <p>15 '92.</p> <p>16 Q. Where does she live?</p> <p>17 A. I believe in Meridian.</p> <p>18 Q. How did you meet?</p> <p>19 A. Through a hair salon.</p> <p>20 Q. But she is not the one who introduced you to</p> <p>21 the product line?</p> <p>22 A. No.</p> <p>23 Q. Did you independently end up working for</p> <p>24 Nu Skin? Both of you?</p> <p>25 A. She is an independent distributor, as well;</p>

<p style="text-align: right;">37</p> <p>1 yes.</p> <p>2 Q. How long have you known Janell Okenaka?</p> <p>3 A. Same time as Deb. 1991, '92, I believe. I'm</p> <p>4 not absolute on that. Early '90s.</p> <p>5 Q. How did you meet?</p> <p>6 A. The hair salon.</p> <p>7 Q. Where does she live?</p> <p>8 A. In Boise.</p> <p>9 Q. How about Sheila Lorrae?</p> <p>10 A. I would say approximately three years. I</p> <p>11 believe that to be accurate. I'm not sure.</p> <p>12 Q. Where does she live?</p> <p>13 A. I believe she lives in Caldwell.</p> <p>14 Q. How did you meet her?</p> <p>15 A. Through Nu Skin.</p> <p>16 Q. When you say that you use Nu Skin lotion on</p> <p>17 your body, can you tell me the name of the product?</p> <p>18 A. I am sad to say I cannot right offhand. Body</p> <p>19 lotion. There are different types.</p> <p>20 Q. Have you always used that body lotion?</p> <p>21 A. No, I have not.</p> <p>22 Q. When did you start using it?</p> <p>23 A. Approximately four years ago. Maybe five.</p> <p>24 Q. Do you use that body lotion on your feet?</p> <p>25 A. No, I do not.</p>	<p style="text-align: right;">39</p> <p>1 A. Yes, it is.</p> <p>2 Q. Do you use it?</p> <p>3 A. I do. It is a live call.</p> <p>4 Q. And you said that you have a different kind of</p> <p>5 call available on weekends?</p> <p>6 A. No. I said on Fridays there is a product</p> <p>7 call.</p> <p>8 Q. What is a product call?</p> <p>9 A. To give us information about different</p> <p>10 products so we have more knowledge.</p> <p>11 Q. How do you approach customers for Nu Skin?</p> <p>12 A. Just talk to them.</p> <p>13 Q. What do you tell them about the products?</p> <p>14 A. Whatever they ask. It varies with every</p> <p>15 person. I don't talk to everybody about it. Generally</p> <p>16 you establish relationships with people. And everybody</p> <p>17 has skin. And everybody has a heartbeat. So people are</p> <p>18 interested in supplementation. I mean, I'm really vain.</p> <p>19 And I know I'm wanting to look as good as I can for as</p> <p>20 long as I can. And be able to function well, too. So</p> <p>21 it is a really broad market.</p> <p>22 Q. How does it help you function well?</p> <p>23 A. Supplement. Nutrition.</p> <p>24 Q. You said that you started taking supplements</p> <p>25 even before you worked for Nu Skin. What kind of</p>
<p style="text-align: right;">38</p> <p>1 Q. Did you ever?</p> <p>2 A. No.</p> <p>3 Q. Did you ever use any lotion on your feet?</p> <p>4 A. You know, I'm sure there has been times I have</p> <p>5 put suntan lotion or some lotion over the tops of my</p> <p>6 feet and heels.</p> <p>7 Q. What about any Nu Skin products on your feet?</p> <p>8 A. The same. Body lotion. I've also used</p> <p>9 Vaseline and Vicks Vapor Rub on dry skin.</p> <p>10 Q. So you did use a body lotion produced by</p> <p>11 Nu Skin on your feet?</p> <p>12 A. Randomly. Nothing daily, unfortunately.</p> <p>13 Q. Do you have someone who gives you information</p> <p>14 about Nu Skin products? Anyone who comes to your sales</p> <p>15 meeting?</p> <p>16 A. We have 1-800 call. We have general calls</p> <p>17 Monday through Friday. And we have product calls on</p> <p>18 Friday. So we have access to any information that we</p> <p>19 need. Plus, it is online what is in the products.</p> <p>20 Q. So when you say general calls you are</p> <p>21 referring to what?</p> <p>22 A. Like a team call. Just to help you with your</p> <p>23 business and what other people are going through.</p> <p>24 Pointers.</p> <p>25 Q. And that is available Monday through Friday?</p>	<p style="text-align: right;">40</p> <p>1 supplements have you taken?</p> <p>2 A. Ever since I was a kid. You take vitamins.</p> <p>3 My earliest recollection is Park Davis vitamins. And I</p> <p>4 have taken Herbal Life. Now I take a LifePak Nano and</p> <p>5 various others. Bone formula. Cartilage bone formula.</p> <p>6 Try to be proactive instead of reactive. I guess I have</p> <p>7 seen what cancer and illness do to people.</p> <p>8 Q. When did you start taking the LifePak Nano?</p> <p>9 A. It has been at least five years.</p> <p>10 Q. Is that a new skin product?</p> <p>11 A. Pharmanex. Nu Skin Pharmanex. It's our</p> <p>12 supplement division of Nu Skin.</p> <p>13 Q. Do you sell Pharmanex supplement products, as</p> <p>14 well?</p> <p>15 A. I'm a distributor for Pharmanex, as well. It</p> <p>16 is under the same banner.</p> <p>17 Q. When did you start taking the bone formula?</p> <p>18 A. I don't know to be exact.</p> <p>19 Q. Five years ago?</p> <p>20 A. I don't know.</p> <p>21 Q. When did you start taking the cartilage</p> <p>22 formula?</p> <p>23 A. Same thing. I don't know to be exact. I take</p> <p>24 a lot of supplements.</p> <p>25 Q. Did you take it in response to anything?</p>

<p style="text-align: right;">41</p> <p>1 A. No. Just to be proactive, like I said.</p> <p>2 Q. When you say you take a lot of supplements.</p> <p>3 Do you take anything more than LifePak Nano, bone</p> <p>4 formula, and cartilage?</p> <p>5 A. Yes, I do.</p> <p>6 Q. What do you take?</p> <p>7 A. I take Tea Green 180. At times I take the</p> <p>8 nighttime formula. And I have been really terrible</p> <p>9 about taking the estrogen. There is three different</p> <p>10 levels of estrogens for women. I believe we have over</p> <p>11 300 different products, too. I take at times AIE 10.</p> <p>12 And Overdrive. I can provide you with a list of the</p> <p>13 supplements that I have at home. I don't take all of</p> <p>14 them regularly. But I do take LifePak Nano and Vitality</p> <p>15 daily. And I try to take Tea Green daily.</p> <p>16 Q. Vitality?</p> <p>17 A. Um-hmm.</p> <p>18 Q. Which product is that? Is that one that you</p> <p>19 mentioned before?</p> <p>20 A. I did not. Vitlaity is a Pharmanex brand.</p> <p>21 Q. What is it for?</p> <p>22 A. The brain, heart, and the muscles. It</p> <p>23 actually provides supplementation for that.</p> <p>24 Q. Are all of the products that you listed</p> <p>25 Pharmanex products?</p>	<p style="text-align: right;">43</p> <p>1 A. I don't know.</p> <p>2 Q. How about randomly? Do you remember when you</p> <p>3 started taking it randomly?</p> <p>4 A. I would say somewhere between two or three</p> <p>5 years ago.</p> <p>6 Q. Were you taking it randomly before April 19,</p> <p>7 2010?</p> <p>8 A. I don't know. I'm being honest with you. I</p> <p>9 don't believe I was. I can go back on my records.</p> <p>10 Q. So do you think you were maybe taking it</p> <p>11 daily?</p> <p>12 A. Not at that time.</p> <p>13 Q. Was there a gap in between?</p> <p>14 A. I don't remember the date that I started. I</p> <p>15 had heard about it on one of the calls.</p> <p>16 Q. How long have you been taking estrogen?</p> <p>17 A. I don't even take it I'm afraid to say. I</p> <p>18 haven't seen any effects.</p> <p>19 Q. You haven't?</p> <p>20 A. I haven't been taking it enough.</p> <p>21 Q. When were you told to take estrogen?</p> <p>22 A. I was never told to.</p> <p>23 Q. When did you start taking it off and on?</p> <p>24 A. Oh, I would say approximately three years ago.</p> <p>25 Q. Would that be prior to the April 19, 2010</p>
<p style="text-align: right;">42</p> <p>1 A. Yes, they are. The ones that I have said</p> <p>2 there.</p> <p>3 Q. Do you take anything else?</p> <p>4 A. I take a blood pressure medication. And I</p> <p>5 take aspirin from time to time. Not very often.</p> <p>6 Q. What is Overdrive?</p> <p>7 A. It's a stamina prior to and after workouts.</p> <p>8 Q. How long have you taken that?</p> <p>9 A. I take it very sporadically. And I don't have</p> <p>10 an exact date.</p> <p>11 Q. Couple years?</p> <p>12 A. I don't know.</p> <p>13 Q. How about the AIE 10? What is that for?</p> <p>14 A. That is for immune. It really helps a lot</p> <p>15 when you are around people flying, traveling. Fatigue.</p> <p>16 Well, I shouldn't say fatigue. Just supplement to</p> <p>17 support your system. A preventative. All of these</p> <p>18 things I take as proactive.</p> <p>19 Q. How often do you take the AIE 10?</p> <p>20 A. I have been taking that randomly. I used to</p> <p>21 take it daily. But it is not cost-effective for me</p> <p>22 right now.</p> <p>23 Q. When did you take it daily?</p> <p>24 A. I don't know. I can't be exact about that.</p> <p>25 Q. A year? Two years?</p>	<p style="text-align: right;">44</p> <p>1 incident?</p> <p>2 A. No. I took it basically when I was going</p> <p>3 through change of life, so to speak.</p> <p>4 Q. How about the Tea Green? How often do you</p> <p>5 take that?</p> <p>6 A. I try to take it every day.</p> <p>7 Q. How long have you taken it for?</p> <p>8 A. Probably close to a year.</p> <p>9 Q. What do you mean you sometimes take the</p> <p>10 nighttime formula? Does it do something different?</p> <p>11 A. It helps to assist you in sleep. These are</p> <p>12 natural ingredients. There is no medications or drugs</p> <p>13 in them.</p> <p>14 Q. When do you take it to assist you with sleep?</p> <p>15 A. I took one last night, as a matter of fact.</p> <p>16 When I need it.</p> <p>17 Q. Do you know what is in it?</p> <p>18 A. I can't tell you offhand. But I can get that</p> <p>19 for you if you need.</p> <p>20 Q. When did you start taking Vitality?</p> <p>21 A. I believe when it first came out. I want to</p> <p>22 say maybe it was two years ago October. I would have to</p> <p>23 go back to see when they launched it.</p> <p>24 Q. How often do you take it?</p> <p>25 A. Daily.</p>

<p style="text-align: right;">45</p> <p>1 Q. Have you noticed a result?</p> <p>2 A. Yes.</p> <p>3 Q. What?</p> <p>4 A. Just mental clarity. Less forgetfulness.</p> <p>5 More stamina.</p> <p>6 Q. As compared with before two years ago?</p> <p>7 A. Well, I'm 54. So things were really different</p> <p>8 two years ago.</p> <p>9 Q. What do you take for your blood pressure</p> <p>10 medication?</p> <p>11 A. I don't remember the name. It's a low dose.</p> <p>12 Lipisol or something. I'm not sure of the name.</p> <p>13 Q. How often do you take aspirin?</p> <p>14 A. There is no set schedule.</p> <p>15 Q. What do you take it for?</p> <p>16 A. If I have a headache.</p> <p>17 Q. Have you ever sold products to Linda Cook?</p> <p>18 A. I know that Linda purchases the Spa. The</p> <p>19 Galvanic Spa. And I believe the skin care. The 180</p> <p>20 System. I believe. But in the process of doing that</p> <p>21 directly with the company so that she is independent, as</p> <p>22 well.</p> <p>23 Q. When you say she is independent, does that</p> <p>24 mean that she is a distributor?</p> <p>25 A. I don't know if she's -- I believe initially</p>	<p style="text-align: right;">47</p> <p>1 that for you. I need to focus in on it and not have it</p> <p>2 be random.</p> <p>3 Q. So it is more than five, less than ten?</p> <p>4 A. I'm trying to figure out how old the kids</p> <p>5 were. I believe it was through Capital. It was more</p> <p>6 than ten years ago.</p> <p>7 Q. More than ten years ago?</p> <p>8 A. I believe it was more than ten years ago. Or</p> <p>9 right around ten years. I'm sorry.</p> <p>10 Q. You met through --</p> <p>11 A. To my knowledge, it would not be more than ten</p> <p>12 years; no. I just need to think about that for just a</p> <p>13 little bit more. My son was in junior high. I don't</p> <p>14 remember if it was seventh grade or eighth grade.</p> <p>15 Q. Which son?</p> <p>16 A. Erik.</p> <p>17 Q. When did you first become aware that she was</p> <p>18 interested in Nu Skin products?</p> <p>19 A. I don't recall. I don't recall how that all</p> <p>20 started. I'm sure I talked to her.</p> <p>21 Q. You guys spend time together as friends?</p> <p>22 A. Yes.</p> <p>23 Q. Have you done so since you met?</p> <p>24 A. Have I spent time with Linda as a friend since</p> <p>25 we met?</p>
<p style="text-align: right;">46</p> <p>1 she was a distributor. I don't know if she is just a</p> <p>2 preferred customer. There is two different areas there.</p> <p>3 But basically it is to get products at cost.</p> <p>4 Q. What is the difference between a preferred</p> <p>5 customer and a distributor?</p> <p>6 A. As a distributor you have a higher taxation</p> <p>7 because basically they know that you are going to -- in</p> <p>8 most cases they feel that you are going to be selling or</p> <p>9 providing your products. So you can sell it at retail.</p> <p>10 So there is a 1099 instead of a W-2.</p> <p>11 Q. Are there any other differences between a</p> <p>12 distributor and a preferred customer?</p> <p>13 A. To my knowledge, no.</p> <p>14 Q. When did you first meet Linda Cook?</p> <p>15 A. I'm thinking it was -- I know we knew each</p> <p>16 other through soccer with our kids.</p> <p>17 Q. When did you meet?</p> <p>18 A. Through soccer. I don't know the exact year.</p> <p>19 I'm trying to remember. There has been a couple of</p> <p>20 different teams in a lot of years. So I don't know the</p> <p>21 exact date. I'm sorry. Or even approximate.</p> <p>22 Q. Five years ago?</p> <p>23 A. More than that.</p> <p>24 Q. Ten?</p> <p>25 A. Not ten. I don't know offhand. I can get</p>	<p style="text-align: right;">48</p> <p>1 Q. Yes.</p> <p>2 A. Yes.</p> <p>3 Q. So originally did you sell Linda products?</p> <p>4 A. I originally introduced Linda. And then she</p> <p>5 was, to the best of my recollection, set up as a</p> <p>6 distributor.</p> <p>7 Q. When was it that you introduced her to the</p> <p>8 products?</p> <p>9 A. I don't remember exactly. I have that record</p> <p>10 at home.</p> <p>11 Q. Five years?</p> <p>12 A. I don't know exactly. I do have it at home.</p> <p>13 I can tell you that.</p> <p>14 Q. Can you approximate it?</p> <p>15 MR. JACOBSON: Objection. Asked and answered.</p> <p>16 Q. (BY MS. ZAVIDOW) We request that you provide</p> <p>17 those records to your attorney so he can turn them over</p> <p>18 to us. We requested relevant records in discovery.</p> <p>19 A. As far as to when I first met Linda? Or when</p> <p>20 I started Nu Skin with Linda?</p> <p>21 Q. When you first started Nu Skin with Linda,</p> <p>22 yes. When you first introduced her. And when she first</p> <p>23 became either a distributor or a preferred customer.</p> <p>24 A. I believe she was a distributor. But I will.</p> <p>25 Q. How often did you sell Linda products?</p>

<p style="text-align: right;">49</p> <p>1 A. I didn't. Linda purchased her own products</p> <p>2 when she became a distributor.</p> <p>3 Q. Originally you never sold her products?</p> <p>4 A. Originally when she got introduced to Nu Skin</p> <p>5 I do not remember to be exact if she just purchased</p> <p>6 products first or if she signed up -- or if I signed her</p> <p>7 up as a distributor right away. I don't remember.</p> <p>8 Q. On April 19, 2010, when you went to</p> <p>9 Fingerprints Day Spa, did you ever solicit business from</p> <p>10 Linda?</p> <p>11 A. No. There would be no reason to solicit</p> <p>12 business.</p> <p>13 Q. Did you ever ask Linda to refer you or Nu Skin</p> <p>14 products to some of her customers?</p> <p>15 A. That would be something that she would do as</p> <p>16 an independent distributor.</p> <p>17 Q. But that was not as a preferred customer? She</p> <p>18 would refer products to her clients at the salon not as</p> <p>19 a preferred customer, but as a distributor?</p> <p>20 A. I'm not clear what you are asking.</p> <p>21 Q. A preferred customer doesn't refer products;</p> <p>22 correct?</p> <p>23 A. They can refer products. It is like if you go</p> <p>24 to a good movie or restaurant.</p> <p>25 Q. Did you go to Fingerprints Day Spa because</p>	<p style="text-align: right;">51</p> <p>1 A. No.</p> <p>2 Q. What other sources of income, other than being</p> <p>3 a distributor for Nu Skin, do you presently have?</p> <p>4 A. My cleaning business.</p> <p>5 Q. Is that it?</p> <p>6 A. That is it.</p> <p>7 Q. Have you ever filed for bankruptcy?</p> <p>8 A. No, I have not.</p> <p>9 Q. Have you ever been involved in any prior</p> <p>10 lawsuit?</p> <p>11 A. No, I have not.</p> <p>12 Q. The repository shows you have been named in</p> <p>13 five collection suits involving your husband.</p> <p>14 A. It would depend on what collections you are</p> <p>15 talking about.</p> <p>16 Q. I don't have those with me. Have you ever</p> <p>17 been charged with a crime considered to be a felony or</p> <p>18 involving theft, stealing, lying or dishonesty?</p> <p>19 A. No.</p> <p>20 Q. Have you ever been involved in any</p> <p>21 work-related accidents or injuries of any kind?</p> <p>22 A. No. Not to my recollection.</p> <p>23 Q. How about nonwork-related accidents or</p> <p>24 injuries?</p> <p>25 A. Are we talking --</p>
<p style="text-align: right;">50</p> <p>1 Linda worked there?</p> <p>2 A. Yes.</p> <p>3 Q. How often had you been there?</p> <p>4 A. I don't know the exact number. I know I have</p> <p>5 had three pedicures in my life.</p> <p>6 Q. Do you remember when you had those pedicures?</p> <p>7 A. My first one was because I had turned 50. And</p> <p>8 then I did one the next year.</p> <p>9 Q. So that is when you were 51?</p> <p>10 A. Yes. So, 50, 51. And then when I was 52.</p> <p>11 Q. Do you go to the salon for other services?</p> <p>12 A. No.</p> <p>13 Q. Just pedicures?</p> <p>14 A. To Fingerprint Spa?</p> <p>15 Q. Yes.</p> <p>16 A. I went specifically for -- there was one time</p> <p>17 I had somebody cut my hair there. And that was it.</p> <p>18 Q. Are you presently on Medicare? Receiving</p> <p>19 benefits from Medicare?</p> <p>20 A. No.</p> <p>21 Q. Have you ever applied for Social Security</p> <p>22 benefits?</p> <p>23 A. No.</p> <p>24 Q. Are you presently receiving any other form of</p> <p>25 benefits or assistance?</p>	<p style="text-align: right;">52</p> <p>1 Q. Throughout your life.</p> <p>2 A. Yes. Of course. Everybody has accidents and</p> <p>3 injuries.</p> <p>4 Q. Can you go through the serious ones? The ones</p> <p>5 that lasted more than a day?</p> <p>6 MR. JACOBSON: I'll object to the form. It is</p> <p>7 just ambiguous and vague.</p> <p>8 Q. (BY MS. ZAVIDOW) Do you understand the</p> <p>9 question?</p> <p>10 A. I believe I do. You were asking about</p> <p>11 illnesses or injuries that I have had throughout my life</p> <p>12 that lasted more than a day?</p> <p>13 Q. Yes.</p> <p>14 A. Yes.</p> <p>15 Q. What are those illnesses or injuries?</p> <p>16 A. I had the German measles when I was like ten</p> <p>17 or eleven. I have had bronchitis. I was in a</p> <p>18 motorcycle accident. I had a polyp removed.</p> <p>19 Pregnancy. For the most part, I'm healthy. I'm</p> <p>20 stumbling. I would like to add to that if I have</p> <p>21 forgotten something.</p> <p>22 Q. What happened to the motorcycle accident? Did</p> <p>23 you injure any part of your body during the motorcycle</p> <p>24 accident?</p> <p>25 A. Yes, I did.</p>

<p style="text-align: right;">53</p> <p>1 Q. Which parts?</p> <p>2 A. All over. A car hit us at 80 miles an hour</p> <p>3 and we slid 100 feet and hit into another car. It was</p> <p>4 really extensive. I'm very fortunate to be here.</p> <p>5 Q. Did you have any injury to your foot at that</p> <p>6 time?</p> <p>7 A. No. I did to my left foot. And my left leg.</p> <p>8 Q. Did you receive any treatment?</p> <p>9 A. Oh, yes.</p> <p>10 Q. For your left foot?</p> <p>11 A. For all of it. It was months.</p> <p>12 Q. Who did you see?</p> <p>13 A. I don't remember. It was in my teenage years.</p> <p>14 Q. Do you remember the year of that motorcycle</p> <p>15 accident?</p> <p>16 A. I want to say maybe 1974. It was in</p> <p>17 California.</p> <p>18 Q. Have you ever injured your right foot in any</p> <p>19 way --</p> <p>20 A. Not that I'm aware of; no.</p> <p>21 Q. -- prior to April 19 o 2010?</p> <p>22 A. Not that I'm aware of. I would have to go</p> <p>23 back and check. But, no.</p> <p>24 Q. Your medical records show you had a toe biopsy</p> <p>25 in 2007. Does that sound familiar?</p>	<p style="text-align: right;">55</p> <p>1 ever had a skiing or sports accident other than the</p> <p>2 motorcycle accident that we are aware of?</p> <p>3 A. "No" for skiing. And you said requiring</p> <p>4 medical attention or hospitalization?</p> <p>5 Q. Sports accidents requiring medical attention.</p> <p>6 MR. JACOBSON: If you remember, you remember.</p> <p>7 If you don't, you don't.</p> <p>8 THE WITNESS: I don't remember.</p> <p>9 Q. (BY MS. ZAVIDOW) Have you ever been injured</p> <p>10 in your home in any way requiring medical attention?</p> <p>11 A. I do not believe I have.</p> <p>12 Q. Before April 19, 2010 did you notice any</p> <p>13 redness, swelling, irritation, thickening or nail</p> <p>14 separation in any of your toenails, including your right</p> <p>15 toe?</p> <p>16 A. No, I did not.</p> <p>17 Q. When did you begin to notice any of those</p> <p>18 symptoms?</p> <p>19 A. April 20.</p> <p>20 Q. Have you ever been treated for any drug or</p> <p>21 alcohol addiction?</p> <p>22 A. No.</p> <p>23 Q. Have you ever smoked?</p> <p>24 A. Yes.</p> <p>25 Q. When did you start smoking?</p>
<p style="text-align: right;">54</p> <p>1 A. It does not. May I see that?</p> <p>2 Q. We will get to it later. Have we finished all</p> <p>3 of your employment history?</p> <p>4 A. To the best of my recollection; yes.</p> <p>5 Q. Did you ever have any work-related accidents?</p> <p>6 MR. JACOBSON: Objection; asked and answered.</p> <p>7 Q. (BY MS. ZAVIDOW) Have you had a skiing or</p> <p>8 sports accidents or been injured in your home in any way</p> <p>9 requiring medical attention?</p> <p>10 A. I would have to think about that. Injured in</p> <p>11 my home?</p> <p>12 Q. Um-hmm.</p> <p>13 A. Requiring medical attention? I would like to</p> <p>14 think about that and come back to it, if I may.</p> <p>15 MR. WRIGHT: Think about it all you want. We</p> <p>16 want to make sure we have your best testimony today.</p> <p>17 And we want to make sure that you have had an</p> <p>18 opportunity to think about anything you need to. So</p> <p>19 take all of the time you need.</p> <p>20 THE WITNESS: Thank you.</p> <p>21 Q. (BY MS. ZAVIDOW) Before April 19 --</p> <p>22 MR. WRIGHT: We are letting her think.</p> <p>23 THE WITNESS: Would you rephrase the question</p> <p>24 again, please?</p> <p>25 Q. (BY MS. ZAVIDOW) Let's limit it to, have you</p>	<p style="text-align: right;">56</p> <p>1 A. Fourteen, 15.</p> <p>2 Q. Until when?</p> <p>3 A. Till 22.</p> <p>4 Q. Do you still smoke?</p> <p>5 A. No, I do not.</p> <p>6 Q. When did you stop?</p> <p>7 A. At 22. And then I started again maybe at 24.</p> <p>8 And then quit again at 29. And started again at 33.</p> <p>9 And then I quit at about eight years.</p> <p>10 Q. You quit eight years ago?</p> <p>11 A. No. It's been maybe five years at least now.</p> <p>12 Q. Since you quit?</p> <p>13 A. Yes. For good.</p> <p>14 Q. Does that mean that you quit in 2008? Does</p> <p>15 that sound right?</p> <p>16 A. I believe. Approximately. I can't be exact.</p> <p>17 It was Memorial Weekend.</p> <p>18 Q. When you smoked how much would you smoke?</p> <p>19 A. Maybe four a day. Cigarettes. Not packs.</p> <p>20 Q. Have you in the past five years used any</p> <p>21 illegal drugs of any kind?</p> <p>22 A. No.</p> <p>23 Q. Why did you quit smoking?</p> <p>24 A. Health risk. And I don't like it.</p> <p>25 Q. Were you told by a doctor to quit?</p>

<p style="text-align: right;">57</p> <p>1 A. No.</p> <p>2 Q. Have you ever been treated for an eating</p> <p>3 disorder?</p> <p>4 A. No.</p> <p>5 Q. I noticed in one of your medical records that</p> <p>6 you had been taken Hydroxycut? How long have you been</p> <p>7 taking Hydroxycut?</p> <p>8 A. I do not remember. It wasn't anything</p> <p>9 regular.</p> <p>10 Q. Do you remember when you took it?</p> <p>11 A. I do not.</p> <p>12 Q. Two years ago? Three years?</p> <p>13 A. I do not remember.</p> <p>14 Q. What did you take it for?</p> <p>15 A. Weight loss.</p> <p>16 Q. Why did you stop?</p> <p>17 A. I don't know. Just didn't like the way it</p> <p>18 made me feel.</p> <p>19 Q. How did it make you feel?</p> <p>20 A. Just kind of got amped up.</p> <p>21 Q. In the last ten years have you undergone</p> <p>22 psychological or psychiatric counseling of any kind?</p> <p>23 A. No.</p> <p>24 Q. I notice from your medical records that your</p> <p>25 medical history included a history of depression.</p>	<p style="text-align: right;">59</p> <p>1 Q. Prescription drugs?</p> <p>2 A. The antidepressant.</p> <p>3 Q. What did you take?</p> <p>4 A. I don't know. It was in 1981.</p> <p>5 Q. How long did you take it?</p> <p>6 A. Approximately -- I don't remember exactly. I</p> <p>7 would say maybe three months.</p> <p>8 Q. Did you have any other periods of depression?</p> <p>9 A. There has been random times where it was</p> <p>10 really minor. Just life. I wouldn't technically call</p> <p>11 it depression. Anxiety.</p> <p>12 Q. Did you ever take anything for it?</p> <p>13 A. Randomly. They would give me something to</p> <p>14 de-stress.</p> <p>15 Q. Who is "they"?</p> <p>16 A. The doctor.</p> <p>17 Q. Who did you see?</p> <p>18 A. Oh, my goodness. Off the top of my head</p> <p>19 Dr. David Nelsen.</p> <p>20 Q. Is it N-e-l-s-o-n?</p> <p>21 A. I think it is e-n. I'm not sure.</p> <p>22 Q. Where was that?</p> <p>23 A. He is here in Idaho.</p> <p>24 Q. Boise?</p> <p>25 A. I believe it is. I don't know if it is Idaho</p>
<p style="text-align: right;">58</p> <p>1 A. Not a history. I had post-partum depression</p> <p>2 after Kyle was born in 1981.</p> <p>3 Q. How long did that last?</p> <p>4 A. Oh, three months.</p> <p>5 Q. Did you see anyone for it?</p> <p>6 A. My regular doctor.</p> <p>7 Q. Who is your regular doctor?</p> <p>8 A. Now? It wasn't then. Dr. Terry Ribbens.</p> <p>9 Q. Now your doctor is Terry Ribbens?</p> <p>10 A. Yes.</p> <p>11 Q. Who was it then?</p> <p>12 A. When I had the antidepressant?</p> <p>13 Q. Yes.</p> <p>14 A. It was Dr. Gale Campofiore.</p> <p>15 Q. Can you spell Campofiore?</p> <p>16 A. I will do my best. C-a-m-p-o-f-i-o-r-e.</p> <p>17 Q. Where was that?</p> <p>18 A. In California.</p> <p>19 Q. What city?</p> <p>20 A. Covina.</p> <p>21 Q. Does Dr. Campofiore work through a hospital?</p> <p>22 A. I have no idea.</p> <p>23 Q. Did Dr. Campofiore treat you in any way for</p> <p>24 your post-partum depression?</p> <p>25 A. Treat me as far as what?</p>	<p style="text-align: right;">60</p> <p>1 or Meridian. I mean -- excuse me. Boise or Meridian.</p> <p>2 Q. Did he prescribe anything for depression?</p> <p>3 A. Yes.</p> <p>4 Q. What did he prescribe?</p> <p>5 A. I don't remember. But it would be in my</p> <p>6 medical records.</p> <p>7 Q. We have the records from a Dr. David Nielsen.</p> <p>8 Is it Dr. David Nielsen?</p> <p>9 A. Yes.</p> <p>10 Q. Did you see anyone else for depression?</p> <p>11 A. Not that I remember.</p> <p>12 Q. From the time of your birth up until April 19,</p> <p>13 2010 I need to know what health care providers you can</p> <p>14 recall having seen for any purpose. So can you start</p> <p>15 from newest to oldest or oldest to newest.</p> <p>16 A. From now Pacific Source is current. Prior to</p> <p>17 that was Mega.</p> <p>18 MR. JACOBSON: Tracy, they asked for the</p> <p>19 health care providers as opposed to health insurance</p> <p>20 companies.</p> <p>21 THE WITNESS: Oh, excuse me. Dr. Terry</p> <p>22 Ribbens is current. Prior to that was Dr. David</p> <p>23 Nielsen. I have seen Dr. Stromberg as a -- who</p> <p>24 delivered Erik. I have seen Dr. Schwikowsky. He's my</p> <p>25 OB-GYN. I'm not sure who the doctors are that do</p>

<p style="text-align: right;">61</p> <p>1 mammograms. I have seen Dr. Mings. Dr. Coffman. 2 Dr. Wyatt. Dr. Otto. Dr. -- there is another doctor 3 with Dr. Otto. And I can't think of her name offhand. 4 I saw her once or twice. I can get that for you. But I 5 believe you have it. Then there is the podiatrist. I'm 6 going blank on that one. There were multiple doctors at 7 the hospital. I don't know their names. St. Luke's 8 Family in 2010. They are part of Dr. Nielsen's group. 9 My goodness. 10 Q. And this is prior to April 19, 2010? 11 A. No. It is not. I apologize for that. Prior 12 to 2010 would be David Nielsen, Dr. Schwikowsky. I 13 don't know who the doctor was that did the polyp. 14 Q. You don't remember the name of that doctor? 15 A. I do not. It was a surgeon. I saw Dr. Burr. 16 It could be Barr. He's a dermatologist. Again, 17 Dr. Stromberg. The baby doctor when I was pregnant with 18 my son. Dr. Kreuger. Did you want dentists? 19 Q. No. 20 A. I don't remember my doctor as a teenager. I 21 remember my doctor as a little person. That would be 22 Dr. Richard Knotts. 23 Q. Is that it? 24 A. To the best of my memory right now. I do not 25 remember anymore.</p>	<p style="text-align: right;">63</p> <p>1 A. Yes, it is. 2 Q. How about Dr. Knotts? Where was he located? 3 A. Covina, California. And then Dr. Blinn was 4 after that. 5 Q. Can you spell Blinn? 6 A. I think it's B-I-I-n-n. He took over after 7 Dr. Knotts. 8 Q. Was that in Covina, as well? 9 A. Yes. 10 Q. What did you see him for? 11 A. Just regular family doctor. 12 Q. When was the most recent time you saw 13 Dr. Ribbens? 14 A. It was in 2012. I don't recall the exact 15 date. 16 Q. According to our records the last time that 17 you saw Dr. Ribbens was 10-08-12. Does that sound 18 right? Or did you see him more recently? 19 A. I don't remember. But I believe it to be -- 20 that sounds accurate. 21 Q. So you did not see him more recently than 22 that? 23 MR. JACOBSON: Objection; asked and answered. 24 Q. (BY MS. ZAVIDOW) Other than the surgeries 25 performed by Dr. Chandler have you had any others?</p>
<p style="text-align: right;">62</p> <p>1 Q. Where does Dr. Burr or Barr practice? 2 A. Here in Meridian. 3 Q. Do you know the facility? 4 A. It is on Overland just past Eagle Road. I 5 can't think of the name of his facility right now. 6 Q. What did you see Dr. Burr for? 7 A. He's a dermatologist. 8 Q. What condition did you see him for? 9 A. Checkup to make sure I don't have any skin 10 cancers. 11 Q. Did you ever have skin cancer? 12 A. No. I used to tan all of the time. 13 Q. Where is Dr. Stromberg? 14 A. I have no idea where he is. Or even if he 15 practicing now. 16 Q. Where was he when you saw him? 17 A. Boise, Idaho. 18 Q. What did you see him for? 19 A. He was my younger son's doctor when I was 20 pregnant. OB-GYN. 21 Q. How about Dr. Kreuger? Where is he? 22 A. He was here in Boise, as well. 23 Q. What is his specialty? 24 A. Delivering babies. 25 Q. Is that why you saw him?</p>	<p style="text-align: right;">64</p> <p>1 A. No, I have not on the toe. 2 Q. Other surgeries on other parts of your body? 3 A. No. 4 Q. Before April 19, 2010 did you have any chronic 5 health problems? 6 A. No. 7 Q. In your records it reflects a history of 8 psoriasis. 9 A. It was something that I developed after my son 10 was born. I have no psoriasis. 11 Q. So you developed psoriasis after your son was 12 born? 13 A. Yes. 14 Q. Which son? 15 A. Erik. 16 Q. What year was that? 17 A. 1990. 18 Q. Have you seen any doctors for your psoriasis? 19 A. Oh, I did initially. I don't recall. I had 20 seen three doctors. One regular doctor and two 21 dermatologists. And the second one actually said he 22 didn't know what it was. And took a biopsy. And then 23 stated it was psoriasis. And that there was no cure for 24 it. 25 Q. And you don't know the names of those doctors?</p>

<p style="text-align: right;">65</p> <p>1 A. I do not recall those names. It was 1990.</p> <p>2 Q. Do you know what facility they worked at?</p> <p>3 A. I do not remember. I can do my best to find</p> <p>4 out.</p> <p>5 Q. That was in Boise?</p> <p>6 A. Yes, it was.</p> <p>7 Q. Would that be through St. Luke's?</p> <p>8 A. No, it was not.</p> <p>9 Q. Was it a private clinic?</p> <p>10 A. They were private independent doctors, I</p> <p>11 believe.</p> <p>12 Q. And you saw three of them?</p> <p>13 A. I did.</p> <p>14 Q. Had you been on any medications of any kind</p> <p>15 leading up to April 19, 2010?</p> <p>16 A. No. I don't take medications.</p> <p>17 Q. Other than the supplements?</p> <p>18 A. That is not medication. But, yes, I take</p> <p>19 supplements.</p> <p>20 Q. If you would like to we can break at this</p> <p>21 point.</p> <p>22 (Recess.)</p> <p>23 Q. (BY MS. ZAVIDOW) We are back on the record.</p> <p>24 When you met Ms. Cook at the hair salon which hair salon</p> <p>25 was that?</p>	<p style="text-align: right;">67</p> <p>1 product and being her distributor?</p> <p>2 A. It benefits to her deal direct. We normally</p> <p>3 have people set up so they can -- I'm not sure what it</p> <p>4 was like at the time that Linda was on. But I know now,</p> <p>5 for example, people have their own password. They go in</p> <p>6 and they log in. They set their own orders. And their</p> <p>7 own delivery. So it cuts out the middle person. They</p> <p>8 deal direct with the company so you are not in a</p> <p>9 situation to where you are having product shipped to you</p> <p>10 and then distributing it and driving around and taking</p> <p>11 care of your clients that way. And there are people</p> <p>12 that wish to build the business.</p> <p>13 Q. Do you receive any remuneration for setting</p> <p>14 someone up as a distributor or a preferred customer?</p> <p>15 A. Remuneration? I'm sorry?</p> <p>16 Q. Payment. Compensation.</p> <p>17 A. Well, they are part of your team. They don't</p> <p>18 pay you to sign somebody up. I mean, you are not paid</p> <p>19 to go out and find people.</p> <p>20 Q. How many people are on your team?</p> <p>21 A. Actually, right now I am starting back all</p> <p>22 over. So it is just me as far as my group.</p> <p>23 Q. What do you mean you are starting back all</p> <p>24 over?</p> <p>25 A. Because I fell out of qualification when I was</p>
<p style="text-align: right;">66</p> <p>1 A. I don't remember if it was the hair salon or</p> <p>2 the soccer field. I was trying to recall.</p> <p>3 Q. It could have been the hair salon?</p> <p>4 A. I believe to the best of my recollection we</p> <p>5 met through soccer. I don't remember if she worked with</p> <p>6 Sherry and the other people at Metamorphous. But I know</p> <p>7 for a fact that our kids played soccer together.</p> <p>8 Q. When you say Sherry. You are referring to</p> <p>9 Sherry, and Deb, and --</p> <p>10 A. No. Excuse me. Deb and Janell.</p> <p>11 Q. And where did you meet Deb and Janell? Which</p> <p>12 hair salon?</p> <p>13 A. Metamorphous.</p> <p>14 Q. Is that in Boise?</p> <p>15 A. It is. Or was. It is no more. It was in</p> <p>16 Boise. Just so I'm accurate. They used to be at one</p> <p>17 location. And they could have taken that name at their</p> <p>18 new location. But when I knew where they were they are</p> <p>19 not in that location anymore. Metamorphous.</p> <p>20 Q. The business is no longer at that location?</p> <p>21 A. That's correct.</p> <p>22 Q. Does it still exist?</p> <p>23 A. I don't know.</p> <p>24 Q. As far as Nu Skin why is it that you set</p> <p>25 Ms. Cook up as a distributor rather than selling her</p>	<p style="text-align: right;">68</p> <p>1 not doing the business. And if you go more than six</p> <p>2 months -- I was just at a beginning point and I didn't</p> <p>3 have a strong enough team built at the time to sustain</p> <p>4 me in what I was doing. So those people are now</p> <p>5 underneath Keith.</p> <p>6 Q. Keith?</p> <p>7 A. Gmirkin.</p> <p>8 Q. So your former team members are now under</p> <p>9 Keith?</p> <p>10 A. That is correct.</p> <p>11 Q. Why did you fall out of qualification?</p> <p>12 A. Because I couldn't work.</p> <p>13 Q. When was it that you fell out of</p> <p>14 qualification?</p> <p>15 A. I don't know the exact date, but I can get</p> <p>16 that for you. But it was definitely -- I will check the</p> <p>17 records and get that answer for you.</p> <p>18 Q. Was it in 2010?</p> <p>19 A. No. It was after. Wait. Let me check my</p> <p>20 memory here. I will have to check. I don't remember if</p> <p>21 it was at the end of 2010 or January of 2011. I don't</p> <p>22 know the exact date.</p> <p>23 Q. How many hours did you work before April 19,</p> <p>24 2010 for Nu Skin?</p> <p>25 A. I worked for myself. And there is no way I</p>

<p style="text-align: right;">69</p> <p>1 could calculate that. I don't have an answer for that.</p> <p>2 Q. Per week an average?</p> <p>3 A. I do not know. I don't track my hours.</p> <p>4 Q. When you receive payment for a product from a</p> <p>5 customer what happens to that payment? How much of it</p> <p>6 do you keep?</p> <p>7 A. I don't receive payment. If I have a product</p> <p>8 that I sell, just somebody wants to use it, and they are</p> <p>9 not signed up, I usually sell it to them at my cost.</p> <p>10 And so my cost and the tax. And shipping if that is</p> <p>11 involved. I don't make a profit from that.</p> <p>12 Q. When you say they are not signed up. Does</p> <p>13 that mean that they are not signed up as a preferred</p> <p>14 customer or as a distributor?</p> <p>15 A. I have people that just order. They don't</p> <p>16 want to sign up. So they order something once every two</p> <p>17 or three months.</p> <p>18 Q. What does it mean to sign up?</p> <p>19 A. That they are not a distributor or a preferred</p> <p>20 customer.</p> <p>21 Q. And to be clear. Do you receive any</p> <p>22 compensation for setting someone up as a distributor or</p> <p>23 a preferred customer?</p> <p>24 A. It completely depends. When they come in</p> <p>25 under those terms, depending upon if they want to be a</p>	<p style="text-align: right;">71</p> <p>1 Q. How many people were in your team before you</p> <p>2 lost qualification?</p> <p>3 A. I don't recall, to be exact. Because I have</p> <p>4 people. And then they have customers underneath them.</p> <p>5 Q. Was Linda Cook ever on your team?</p> <p>6 A. She was a distributor, I believe. I'm pretty</p> <p>7 sure that I signed her up as a distributor. Because</p> <p>8 that is the direction we were given at the time. But I</p> <p>9 wasn't building a team really then. I had no concept</p> <p>10 about -- and it has changed a lot as far as what we are</p> <p>11 doing. She is a friend. And she was introduced to Nu</p> <p>12 Skin through me. She became a preferred customer. And</p> <p>13 now it is completely different than what it was at the</p> <p>14 time. And my knowledge, and what I'm doing with the</p> <p>15 company now, is completely different than it was then.</p> <p>16 Q. You mentioned that you have had three</p> <p>17 pedicures in the past. Did Linda Cook give you those</p> <p>18 pedicures?</p> <p>19 A. She did.</p> <p>20 Q. During those pedicures did you discuss with</p> <p>21 Linda Cook Nu Skin products?</p> <p>22 A. I'm sure we probably talked about things. She</p> <p>23 was a product user. And I was a product user. I wasn't</p> <p>24 building a team then.</p> <p>25 Q. She was a product user at the time of all</p>
<p style="text-align: right;">70</p> <p>1 business builder, or just a distributor, their volume</p> <p>2 goes underneath my circle group and I get credit from</p> <p>3 the company as far as having a circle group volume. And</p> <p>4 that is how we in part make our money.</p> <p>5 Q. Does having a certain amount of volume benefit</p> <p>6 you in some way?</p> <p>7 A. Absolutely.</p> <p>8 Q. How?</p> <p>9 A. There is multiple different ways. But it goes</p> <p>10 towards my income. What I get on a monthly or weekly</p> <p>11 basis.</p> <p>12 Q. You sell a product and you receive</p> <p>13 compensation? Is that the case?</p> <p>14 A. Not compensation. The person purchases the</p> <p>15 product. The volume goes underneath me. And so I get</p> <p>16 the credit for the circle group volume.</p> <p>17 Q. When you say credit for the circle group</p> <p>18 volume, does that relate to your payment?</p> <p>19 A. To what I obtain from the company as a</p> <p>20 distributor.</p> <p>21 Q. What do you obtain from the company? How</p> <p>22 much?</p> <p>23 A. It depends on who is in my line. Who is</p> <p>24 underneath me. How much product I disperse. It is like</p> <p>25 going to a store without having the middleman.</p>	<p style="text-align: right;">72</p> <p>1 three pedicures, but not a distributor?</p> <p>2 A. Well, product user. Distributor. I'm a</p> <p>3 product user. I'm saying we used the product. And I</p> <p>4 don't recall the date. Like I said, I'll get you the</p> <p>5 date. I have that at home.</p> <p>6 Q. What document contains the date?</p> <p>7 A. The date that she signed up.</p> <p>8 Q. What kind of record is that that has a date on</p> <p>9 it? Oh, I see. Your business record?</p> <p>10 A. Exactly. And the company has a record.</p> <p>11 Q. On the date of the incident, April 19, 2010,</p> <p>12 did you discuss with Linda Cook Nu Skin products?</p> <p>13 MR. JACOBSON: Objection; asked and answered.</p> <p>14 You can go ahead and answer again.</p> <p>15 THE WITNESS: I do not recall. But I talk</p> <p>16 about Nu Skin all of the time. So it most probably was</p> <p>17 in the conversation. But I do not know to be absolutely</p> <p>18 sure.</p> <p>19 Q. (BY MS. ZAVIDOW) Going to the day of the</p> <p>20 pedicure. Had you ever received a pedicure from</p> <p>21 anywhere else?</p> <p>22 A. I have three pedicures. No.</p> <p>23 Q. What kind of pedicure did you have that day?</p> <p>24 A. Just a pedicure. I don't know if there is</p> <p>25 different kinds.</p>

<p style="text-align: right;">73</p> <p>1 Q. What does the pedicure involve?</p> <p>2 A. You go in. You sit down and soak your feet.</p> <p>3 It's almost like a Jacuzzi type smaller tub. It's</p> <p>4 amazing. They push back the cuticles. They do any</p> <p>5 clipping that is necessary. They slough off the</p> <p>6 callouses or corns. You get an incredible massage on</p> <p>7 the calves of your legs and your feet. You pick out</p> <p>8 your polish. And she makes your feet look great.</p> <p>9 Q. And "she" is Linda Cook?</p> <p>10 A. Linda, yes.</p> <p>11 Q. Do you cut your own cuticles when you are not</p> <p>12 having pedicure?</p> <p>13 A. I don't cut my cuticles.</p> <p>14 Q. Do you clip your toenails?</p> <p>15 A. I either clip them or file them.</p> <p>16 Q. Do you have your own tools?</p> <p>17 A. Basic clippers; yes.</p> <p>18 Q. Did you bring them with you that day?</p> <p>19 A. No.</p> <p>20 Q. How long did it take?</p> <p>21 A. I don't recall exactly.</p> <p>22 Q. Like an hour?</p> <p>23 A. I don't recall exactly.</p> <p>24 MR. WRIGHT: I think lunch is here.</p> <p>25 (Noon recess.)</p>	<p style="text-align: right;">75</p> <p>1 A. Before.</p> <p>2 Q. So you have been an independent distributor</p> <p>3 for Nu Skin since three, three-and-a-half years ago.</p> <p>4 And it wasn't until 2010 that you started creating a</p> <p>5 team; is that correct?</p> <p>6 A. It may have been 2009. I don't recall</p> <p>7 exactly. I would have to go back and look in my</p> <p>8 records.</p> <p>9 Q. When you say your records what exactly are you</p> <p>10 referring to?</p> <p>11 A. The activity that I had. I have obviously my</p> <p>12 files for tax purposes. And also that is my</p> <p>13 personality. That is what I do.</p> <p>14 Q. Do you keep personal records and business</p> <p>15 records?</p> <p>16 A. As pertaining to what?</p> <p>17 Q. To your business. To Nu Skin and your</p> <p>18 arrangement with Nu Skin as an independent distributor.</p> <p>19 You said it is part of your personality to keep personal</p> <p>20 records.</p> <p>21 A. I am pretty organized.</p> <p>22 Q. We request that you provide these records to</p> <p>23 your counsel.</p> <p>24 A. Which records?</p> <p>25 Q. The business records having to do with</p>
<p style="text-align: right;">74</p> <p>1 Q. (BY MS. ZAVIDOW) Back on the record.</p> <p>2 Ms. Sales, I'm still not quite understanding how you are</p> <p>3 paid by Nu Skin. Because you say that you get the</p> <p>4 benefit of something having to do with a circle volume.</p> <p>5 I don't understand that term.</p> <p>6 But how are you paid in relation to how many</p> <p>7 people you have in your group?</p> <p>8 A. You are not paid by the amount of people. It</p> <p>9 is by volume of product that is being generated by my</p> <p>10 circle group and myself. So that is how I'm paid.</p> <p>11 Q. How often are you paid?</p> <p>12 A. It can be weekly. They always pay automatic</p> <p>13 deposit by the 20th. But it depends on the different</p> <p>14 aspects that we might be doing. You might get a check</p> <p>15 weekly on top of your monthly check.</p> <p>16 Q. What makes the difference?</p> <p>17 A. The amount of people that are buying product</p> <p>18 from the company.</p> <p>19 Q. When did you first start creating a team?</p> <p>20 A. I don't know exactly the date.</p> <p>21 Q. Can you give me an approximation? The year</p> <p>22 and month?</p> <p>23 A. It was in 2010. But I can't give you a day</p> <p>24 exactly; no.</p> <p>25 Q. Was it before or after the pedicure incident?</p>	<p style="text-align: right;">76</p> <p>1 Nu Skin. And your relationship with Nu Skin as an</p> <p>2 independent distributor. We requested records having to</p> <p>3 do with your business with Nu Skin and those were not</p> <p>4 produced.</p> <p>5 MR. JACOBSON: Counsel, to the extent that</p> <p>6 such exist we'll provide them.</p> <p>7 Q. (BY MS. ZAVIDOW) Have you ever met</p> <p>8 Mrs. Peabody?</p> <p>9 A. Yes, I have.</p> <p>10 Q. When?</p> <p>11 A. I don't know the exact date.</p> <p>12 Q. Can you give me the year and the month?</p> <p>13 A. I cannot.</p> <p>14 Q. What year was it?</p> <p>15 A. I don't know to be exactly sure.</p> <p>16 Q. In what context did you meet Ms. Peabody?</p> <p>17 A. Through Fingerprints Day Spa.</p> <p>18 Q. While you were there for a pedicure?</p> <p>19 A. I do not remember.</p> <p>20 Q. Do you ever go to Fingerprints Day Spa for</p> <p>21 anything other than pedicure and that single incident of</p> <p>22 a haircut?</p> <p>23 A. That's it.</p> <p>24 Q. So it must have been on one of those four</p> <p>25 occasions you met Ms. Peabody?</p>

<p style="text-align: right;">77</p> <p>1 MR. JACOBSON: Object to form.</p> <p>2 MR. WRIGHT: She can answer.</p> <p>3 THE WITNESS: Honestly, I don't remember when</p> <p>4 I met her. It could have been 2008. It could have been</p> <p>5 later. I don't remember.</p> <p>6 Q. (BY MS. ZAVIDOW) Did you meet while you were</p> <p>7 at the salon?</p> <p>8 A. To the best of my memory.</p> <p>9 Q. Had you met her on more than one occasion?</p> <p>10 A. I met her that one time. I talked to her on a</p> <p>11 couple of occasions to say hello when I have been in</p> <p>12 there.</p> <p>13 Q. What did you talk about?</p> <p>14 A. She has a Spa. She purchased a Galvanic Spa.</p> <p>15 We talked about the Spa. Very brief. It wasn't</p> <p>16 something that I recall.</p> <p>17 Q. Did she purchase that product from you?</p> <p>18 A. Yes, she did.</p> <p>19 Q. When was that?</p> <p>20 A. I don't have the exact date. I would have to</p> <p>21 look that up.</p> <p>22 Q. Was that in 2010?</p> <p>23 A. It was before that.</p> <p>24 Q. 2009?</p> <p>25 A. I don't have the exact date. I want to be</p>	<p style="text-align: right;">79</p> <p>1 Fingerprints.</p> <p>2 Q. Did you make the appointment with Linda</p> <p>3 herself when you called?</p> <p>4 A. Yes. Either that or leave a message and she</p> <p>5 would call back.</p> <p>6 Q. Did you ever speak to Ms. Peabody about the</p> <p>7 appointment?</p> <p>8 A. No.</p> <p>9 Q. Are you required to have a certain number of</p> <p>10 people on your team in order to be paid?</p> <p>11 A. No.</p> <p>12 Q. Are you required to have a certain amount of</p> <p>13 volume of sales in order to continue being at your level</p> <p>14 as an independent distributor?</p> <p>15 A. Not to be an independent distributor; no.</p> <p>16 Q. The people on your team were referred to as</p> <p>17 what?</p> <p>18 A. Independent distributors.</p> <p>19 Q. And you are an independent distributor, as</p> <p>20 well?</p> <p>21 A. Yes.</p> <p>22 Q. Are they on the same level as you? Or below</p> <p>23 you?</p> <p>24 A. Many people are whatever level they decide</p> <p>25 that they want to get to.</p>
<p style="text-align: right;">78</p> <p>1 specific.</p> <p>2 Q. Did you have an ongoing purchase relationship</p> <p>3 with Ms. Peabody? Did you sell her product on more than</p> <p>4 one occasion?</p> <p>5 A. I don't remember. But there again -- no, I</p> <p>6 don't remember. I just don't remember.</p> <p>7 Q. Did you ever try to discuss having Ms. Peabody</p> <p>8 become a distributor?</p> <p>9 A. No.</p> <p>10 Q. On April 19, 2010, after the pedicure, who did</p> <p>11 you pay?</p> <p>12 A. Linda.</p> <p>13 Q. Do you recall if Ms. Peabody was present?</p> <p>14 A. She was not there that day when I was there.</p> <p>15 Q. Did Ms. Cook ever talk to you about her work</p> <p>16 for Fingerprint Day Spa? How her payment was arranged?</p> <p>17 How she scheduled her hours?</p> <p>18 A. No. There was no reason to.</p> <p>19 Q. She never discussed with you anything about</p> <p>20 how she was paid?</p> <p>21 A. No. I never asked.</p> <p>22 Q. How did you make an appointment for the</p> <p>23 pedicure?</p> <p>24 A. I would call the phone number. Sometimes I</p> <p>25 would call her cell. And sometimes I would call</p>	<p style="text-align: right;">80</p> <p>1 Q. Do you know how much of the sales go to the</p> <p>2 person who sold the product as opposed to you who get</p> <p>3 the benefit of the volume of the sales of your team</p> <p>4 members?</p> <p>5 A. Can you be a little clearer? I'm sorry.</p> <p>6 Q. One of the people on your team sells a</p> <p>7 product. That product is sold for money. The money</p> <p>8 comes in. How is the money distributed?</p> <p>9 A. Money goes to Nu Skin for the product. Or to</p> <p>10 the distributor if they already had the product. And</p> <p>11 they're selling it through their home.</p> <p>12 Q. If they purchase the Nu Skin product, kept</p> <p>13 stock, and sold it?</p> <p>14 A. If that is what they choose to do. You don't</p> <p>15 have to have an overhead. There is no requirement for</p> <p>16 that. So that is why they are set up independently so</p> <p>17 they can have that channel directly with the Nu Skin</p> <p>18 facility.</p> <p>19 Q. And how is the seller of the product paid? So</p> <p>20 you have a member of your team on your team. How are</p> <p>21 they paid? You said that you get paid by Nu Skin. Are</p> <p>22 they also paid a percentage of their sales by Nu Skin?</p> <p>23 A. They get paid from the circle group volume,</p> <p>24 because that person is underneath me. Depending upon</p> <p>25 whether or not they are a distributor or whether they</p>

<p style="text-align: right;">81</p> <p>1 broke into any particular level. I get three percent or</p> <p>2 five percent of their sales. Not of their money. And I</p> <p>3 get that from the company. They pay us in lieu of</p> <p>4 paying advertisement.</p> <p>5 Q. You get three percent to five percent of the</p> <p>6 sales of people beneath you within your team?</p> <p>7 A. It depends on their level. It depends on</p> <p>8 where they are at. I get paid based on their circle</p> <p>9 group volume on what they sell. But it depends on if</p> <p>10 they are just a distributor or if they have broken to a</p> <p>11 gold or above level. Then that reduces the amount of</p> <p>12 money that I get paid. But I still get their volume.</p> <p>13 It's complicated. But it's simple.</p> <p>14 Q. You get the benefit of their volume in</p> <p>15 addition -- even though they are on the same level or a</p> <p>16 higher level than you are?</p> <p>17 A. If they are higher than I am then I do not. I</p> <p>18 get just a flat.</p> <p>19 Q. How many levels are there?</p> <p>20 A. Twelve, I guess. They come in groups of four,</p> <p>21 so twelve all together. Four groups of four, basically.</p> <p>22 Q. What level are you at?</p> <p>23 A. I am just -- I still haven't even -- I've got</p> <p>24 to requalify to become an executive. I'm just a</p> <p>25 distributor right now.</p>	<p style="text-align: right;">83</p> <p>1 A. They are personal and I would rather not go</p> <p>2 into that. It has nothing to do with Nu Skin.</p> <p>3 Q. If they are related to your psychological or</p> <p>4 emotional well-being it is our position that that is</p> <p>5 relevant to the matters in this case.</p> <p>6 A. It's not. It is not related to that.</p> <p>7 Q. If they are related to physical conditions or</p> <p>8 symptoms it is also our position that it is relevant.</p> <p>9 A. It is not.</p> <p>10 Q. Is it correct that after the April 19, 2010</p> <p>11 incident you went to the emergency room at St. Luke's to</p> <p>12 be seen for chest pain and at that time you denied any</p> <p>13 other acute concerns and had an unremarkable physical</p> <p>14 exam? Do you remember that?</p> <p>15 A. I don't know the date, but I went to the</p> <p>16 emergency room. It was a Sunday. And I went in because</p> <p>17 I thought I might have had a cracked rib. But because I</p> <p>18 went into the emergency room they asked, "Are you having</p> <p>19 chest pain?" And I said, "No, I'm having a pain here."</p> <p>20 And they said they had to treat me as if I am having a</p> <p>21 possible heart attack because of my age. And so that</p> <p>22 process began. And then I was released.</p> <p>23 Q. And you did not at that time mention anything</p> <p>24 with your toe?</p> <p>25 A. There was no reason to; no.</p>
<p style="text-align: right;">82</p> <p>1 Q. How do you requalify?</p> <p>2 A. By selling certain amount of volume. Or</p> <p>3 buying a business pack. Which I can't afford to do.</p> <p>4 Q. So you would qualify by selling volume or</p> <p>5 buying a business pack?</p> <p>6 A. Or by purchasing my own product. A certain</p> <p>7 amount of volume. I don't have to buy a kit.</p> <p>8 Q. You said that you have to requalify to be an</p> <p>9 executor. When were you an executor?</p> <p>10 A. Executive.</p> <p>11 Q. Excuse me. Executive.</p> <p>12 A. I have been a couple times over. A couple</p> <p>13 months ago. I don't have the exact date. But then I</p> <p>14 fell back out. So I'm redoing it for personal reasons.</p> <p>15 Q. A couple of months ago you were an executive?</p> <p>16 A. I believe it was November.</p> <p>17 Q. Of 2012?</p> <p>18 A. Yes.</p> <p>19 Q. And then your sales dropped; is that correct?</p> <p>20 A. That's correct. I stopped doing it for a</p> <p>21 while.</p> <p>22 Q. Why did you stop?</p> <p>23 A. Personal reasons.</p> <p>24 Q. When you say personal reasons, what reasons</p> <p>25 are you referring to?</p>	<p style="text-align: right;">84</p> <p>1 Q. During the pedicure did you experience any</p> <p>2 pain at any point?</p> <p>3 A. I did not experience pain. There was one</p> <p>4 point where there was -- well, yes, I did at one brief</p> <p>5 point. Very quick.</p> <p>6 Q. When was that?</p> <p>7 A. When going around the cuticle it was sensitive</p> <p>8 in one area. It didn't break open. It didn't bleed.</p> <p>9 And it was not cuticle clippers. It was just pushing</p> <p>10 back on the cuticle.</p> <p>11 Q. Where on your toe was it sensitive?</p> <p>12 A. On my right toe. Right at the nail bed.</p> <p>13 Q. Had you ever felt that sensitivity before?</p> <p>14 A. I have never had that happen; no.</p> <p>15 Q. During your prior pedicures no pain?</p> <p>16 A. No.</p> <p>17 Q. Was there any blood?</p> <p>18 A. No.</p> <p>19 Q. Redness?</p> <p>20 A. Well, after there was a little bit of redness.</p> <p>21 But never any blood.</p> <p>22 Q. Did the pain continue throughout the pedicure?</p> <p>23 A. No. It was just like if you drop something on</p> <p>24 your toe for a second. It was just real brief.</p> <p>25 Q. After the pedicure did you go home?</p>

<p style="text-align: right;">85</p> <p>1 A. I don't remember.</p> <p>2 Q. That evening did you feel pain?</p> <p>3 A. I don't remember.</p> <p>4 Q. You don't remember whether you felt pain that</p> <p>5 evening?</p> <p>6 A. That's correct.</p> <p>7 Q. When was the first time you felt pain after</p> <p>8 the pedicure?</p> <p>9 A. The next day it was sensitive, and red, and</p> <p>10 puffing up.</p> <p>11 Q. Did the symptoms of red and puffiness continue</p> <p>12 beyond that second day?</p> <p>13 A. They did. I don't remember how long. I</p> <p>14 remember thinking it was just a hangnail or possibly an</p> <p>15 ingrown nail. And then within a short period of time it</p> <p>16 dissipated and it wasn't red and puffy anymore.</p> <p>17 Q. How long a period?</p> <p>18 A. I do not know. I do not remember.</p> <p>19 Q. Was it a matter of days?</p> <p>20 A. I don't remember.</p> <p>21 Q. But you recall that the pain went away?</p> <p>22 A. That irritation. I really wouldn't even call</p> <p>23 it exactly pain. It was just irritated and swollen at</p> <p>24 that point. There wasn't any pain.</p> <p>25 Q. When did the pain return?</p>	<p style="text-align: right;">87</p> <p>1 somewhat.</p> <p>2 Q. How so?</p> <p>3 A. It was uncomfortable, so I didn't do it.</p> <p>4 Q. Why didn't you see a doctor?</p> <p>5 A. Because I had no knowledge -- I just assumed</p> <p>6 it was -- I didn't think to go to the doctor for a sore</p> <p>7 toe at that point.</p> <p>8 Q. You said that you started having difficulty</p> <p>9 walking in September; is that correct?</p> <p>10 A. I started to feel it in September. The</p> <p>11 difficulty really started to accelerate in October.</p> <p>12 Q. You started to feel it in September. By which</p> <p>13 you mean you felt pain?</p> <p>14 A. It was a different sensation. It was just</p> <p>15 something that you know isn't right. And it just</p> <p>16 gradually got more intense.</p> <p>17 Q. If you knew that the sensation made you feel</p> <p>18 that it wasn't right, why did you not go to a doctor?</p> <p>19 A. I did finally in October. Because I saw green</p> <p>20 under my nail. And I thought that it might be gangrene.</p> <p>21 And I went to the doctor. And he said it was a fungus.</p> <p>22 Q. Are you referring to Physician Assistant</p> <p>23 McDermott?</p> <p>24 A. I saw one in October and one in November at</p> <p>25 the same facility. They were both PA's. I don't</p>
<p style="text-align: right;">86</p> <p>1 A. Sometime during the summer. Then it was in a</p> <p>2 totally different aspect. It wasn't just right there at</p> <p>3 the nail bed.</p> <p>4 Q. What do you mean by totally different aspect?</p> <p>5 A. I could feel it in my bone.</p> <p>6 Q. Can you describe that pain?</p> <p>7 A. Well, it felt like a lot of pressure. At that</p> <p>8 particular stage it was an irritant. I was running. I</p> <p>9 used to run and work out at home. Not in the gym. And</p> <p>10 I just assumed it was my shoes.</p> <p>11 Q. Were they new shoes?</p> <p>12 A. One pair was.</p> <p>13 Q. What happened after that?</p> <p>14 A. I started having a problem walking. In</p> <p>15 September I remember it being painful. October it was</p> <p>16 extremely painful and had been swollen about three times</p> <p>17 the size of my normal toe.</p> <p>18 Q. When you say that the pain started again in</p> <p>19 the summer. Do you remember what month that was?</p> <p>20 A. I do not.</p> <p>21 Q. June?</p> <p>22 A. I don't remember.</p> <p>23 Q. Did the pain that started in the summer</p> <p>24 influence your activities?</p> <p>25 A. It didn't influence it, but it changed it</p>	<p style="text-align: right;">88</p> <p>1 remember which one was first.</p> <p>2 Q. Were you referred by anyone to Mr. McDermott?</p> <p>3 A. No, I was not.</p> <p>4 Q. What did you tell him was wrong?</p> <p>5 A. I was asking him. He told me.</p> <p>6 Q. What did you tell him were your symptoms?</p> <p>7 A. That I had a sore toe and it was red. And I</p> <p>8 had green under the nail.</p> <p>9 Q. And you recall that he told you it was a</p> <p>10 fungal infection?</p> <p>11 A. Yes.</p> <p>12 Q. What treatment did he tell you to do?</p> <p>13 A. To put Vicks vapor rub on it twice a day and</p> <p>14 it will probably take about a year.</p> <p>15 Q. And did you do that?</p> <p>16 A. I started to.</p> <p>17 Q. What happened?</p> <p>18 A. The nail got loose and lifted off. Came off.</p> <p>19 Q. Did the treatment with Vicks vapor rub</p> <p>20 alleviate some of your pain?</p> <p>21 A. I don't recall. There was pain initially,</p> <p>22 too, because of all of the swelling. Pressure.</p> <p>23 Q. Why did you not go to the doctor when the</p> <p>24 treatment recommended by Mr. McDermott did not seem</p> <p>25 effective?</p>

<p style="text-align: right;">89</p> <p>1 A. I did. I went back in November.</p> <p>2 Q. I see from the medical records that your nail</p> <p>3 had already come off in October. And the medical</p> <p>4 records show that you went back in December.</p> <p>5 MR. JACOBSON: Are you referring to a specific</p> <p>6 record, Counsel?</p> <p>7 MS. ZAVIDOW: I am. I am referring to the</p> <p>8 record for David Nielsen. I wasn't going to make it an</p> <p>9 exhibit. But it is Plaintiff's 5 and 6.</p> <p>10 MR. JACOBSON: Is that the 11-16 --</p> <p>11 MS. ZAVIDOW: 12-01-10.</p> <p>12 Q. (BY MS. ZAVIDOW) There was a gap in time in</p> <p>13 our records from November 16 to December 1, during which</p> <p>14 you did not see a doctor. And yet it does not appear</p> <p>15 that your condition improved.</p> <p>16 A. In November I was given a prescription that I</p> <p>17 took for the course of, I believe, two weeks. I don't</p> <p>18 remember. When I got done with that my next step was to</p> <p>19 go see Dr. Nielsen. And I went to see him. And then it</p> <p>20 went from there.</p> <p>21 Q. Returning to your visit with Mr. McDermott.</p> <p>22 Let's mark this as Exhibit 2.</p> <p>23 (Exhibit 2 marked.)</p> <p>24 Q. (BY MS. ZAVIDOW) Does this record look</p> <p>25 familiar?</p>	<p style="text-align: right;">91</p> <p>1 your toes and dropped a book on them some time ago.</p> <p>2 Does that sound familiar?</p> <p>3 A. No. Because, like I said, that was a typo.</p> <p>4 Six months prior to that was May of 2010, I believe.</p> <p>5 Q. I'm referring to the dropping a book on the</p> <p>6 toes.</p> <p>7 A. That didn't even happen to that foot. I don't</p> <p>8 even remember -- I have no clue.</p> <p>9 Q. Did it happen to any foot?</p> <p>10 A. I remember, like I said, on my left foot. But</p> <p>11 I don't recall a date or anything. It's a typo on the</p> <p>12 16 months.</p> <p>13 Q. You did drop a book on your left foot?</p> <p>14 A. I totally don't even remember that. I don't</p> <p>15 even remember the book incident.</p> <p>16 MS. ZAVIDOW: Off the record for a moment.</p> <p>17 (Recess.)</p> <p>18 Q. (BY MS. ZAVIDOW) Was the only recommendation</p> <p>19 that Mr. McDermott made to use Vicks ointment?</p> <p>20 A. He stated that an option I could take would be</p> <p>21 to -- I don't know the name of the medication. He said</p> <p>22 it is about a six-month process. There is no guarantee</p> <p>23 that it works. It is extremely hard on the liver and</p> <p>24 the kidneys. And your insurance won't pay for it. And</p> <p>25 it was expensive. But mainly he said there is no -- it</p>
<p style="text-align: right;">90</p> <p>1 A. It does. Somewhat.</p> <p>2 Q. You see that your name is at the top as a</p> <p>3 patient and you recall meeting with Dr. Nielsen?</p> <p>4 A. This is Dave McDermott.</p> <p>5 Q. David McDermott. Yes. Can you please read</p> <p>6 under "General Notes" starting with "Tracy is here."</p> <p>7 A. "Tracy is here for concerns of mild fungus of</p> <p>8 her right great toe. For the past 16 months she noticed</p> <p>9 thickening and separation of the nail from the foot.</p> <p>10 There is no pain, redness or tenderness with this. She</p> <p>11 did injure the toe and dropped a book on them some time</p> <p>12 ago. She has no history of other skin or foot problems.</p> <p>13 Further review is negative."</p> <p>14 Q. Regarding the note that in the past 16 months</p> <p>15 you noticed thickening and separation of the nail from</p> <p>16 the foot. Do you recall discussing that with</p> <p>17 Mr. McDermott?</p> <p>18 A. Somewhat.</p> <p>19 Q. Now, 16 months brings us to a time before</p> <p>20 April 19, 2010. Did you experience symptoms, including</p> <p>21 separation and thickening of the nail from the foot</p> <p>22 before April 19, 2010?</p> <p>23 A. No. I believe that is a typo. It was six</p> <p>24 months. Six months before that.</p> <p>25 Q. Going back to the note that you did injure</p>	<p style="text-align: right;">92</p> <p>1 didn't always work. That is when he said you can put</p> <p>2 Vicks vapor rub on two times a day.</p> <p>3 Q. Did he tell you that would be just as</p> <p>4 effective?</p> <p>5 A. He just stated what he stated about the</p> <p>6 prescription or about the Vicks. He said it would heal</p> <p>7 it.</p> <p>8 Q. Do you recall the nature of the prescription</p> <p>9 that he said was an option?</p> <p>10 A. I do not.</p> <p>11 Q. Was it antifungal?</p> <p>12 A. I do not know.</p> <p>13 MS. RYAN: James, can I talk to you for a</p> <p>14 minute?</p> <p>15 MR. JACOBSON: If we can go off the record.</p> <p>16 (Recess.)</p> <p>17 Q. (BY MS. ZAVIDOW) Is it correct that the</p> <p>18 next time after you saw Physician Assistant McDermott</p> <p>19 the next time you saw a provider for your toe was</p> <p>20 Mary Mebane?</p> <p>21 A. Yes.</p> <p>22 Q. Were you referred by anyone?</p> <p>23 A. No.</p> <p>24 Q. What did you tell her about your toe and the</p> <p>25 symptoms that you were having?</p>

<p style="text-align: right;">93</p> <p>1 A. Basically, to the best of my recollection, 2 that it was sore. It had gotten worse. And I was just 3 concerned because it was swelling. 4 Q. What did she tell you about your condition? 5 A. I don't remember all that was said. But she 6 put me on an antibiotic. 7 Q. Did you take the antibiotic? 8 A. Yes, I did. 9 Q. I see from the notes that she also recommended 10 you apply moist heat packs. Did you do that, as well? 11 A. No, I did not. 12 Q. Why not? 13 A. Because it was inflamed and swelling. 14 Q. Did you make the determination on your own not 15 to apply the moist heat packs? 16 A. Yes. I tried once and it was uncomfortable. 17 Q. Did you tell Physician Assistant Mebane that 18 you were not planning to apply the moist heat packs? 19 A. No. Because I did try. And she was not my 20 regular doctor. 21 Q. Was a diagnosis made? 22 A. No. 23 Q. Did anyone go with you to Physician Assistant 24 Mebane? 25 A. No.</p>	<p style="text-align: right;">95</p> <p>1 Q. Why did you go to Dr. Nielsen? 2 A. He's my doctor. He was my primary doctor. 3 General doctor. 4 Q. At the time he was your primary doctor? 5 A. Yes. 6 Q. Why did you switch? 7 A. Because he told me I had classic sausage toe 8 and I was just going to have to live with it. And gave 9 me a prescription for antidepressants. He wasn't -- I 10 had some questions after the doctors he had sent me to. 11 And he stated that he wasn't going to challenge their 12 opinion. He sent me to the best doctors there are. And 13 that is when he said, "You are just going to have to 14 live with it." 15 Q. What did he tell you about your condition 16 during that first visit with him? 17 A. The first time I went regarding this? 18 Q. Yes. 19 A. He sent me to Idaho Infectious Disease, 20 because he felt that I had MRSA. 21 Q. MRSA? 22 A. That's correct. 23 Q. What treatment did he provide you with other 24 than sending you? 25 A. Told me to go home and elevate my foot above</p>
<p style="text-align: right;">94</p> <p>1 Q. Did Ms. Mebane make any recommendations to you 2 to see other providers? 3 A. Not that I recall; no. 4 Q. Did she tell you anything with regard to your 5 prognosis? 6 A. We were in an early stage and just figuring 7 things out; no. No prognosis. 8 Q. Did she tell you to come back? 9 A. I do not remember her saying to come back. 10 Q. Did she tell you to avoid certain activities? 11 A. She did not. 12 Q. Did she tell you to watch for certain symptoms 13 and come back if you saw those symptoms? 14 A. I do not recall any of that; no. 15 Q. I see from the records the next time we have 16 you seeking treatment for your toe is when you saw 17 Dr. David Nielsen at St. Luke's; is that correct? 18 A. St. Luke's Care. Not the hospital. That is 19 the same with Mary Mebane and McDermott. 20 Q. Id you see Dr. Nielsen more than once? 21 A. Yes, I did. 22 Q. How often did you see him? 23 A. I do not recall exactly. 24 Q. Were you referred by anyone? 25 A. No.</p>	<p style="text-align: right;">96</p> <p>1 my heart, because this was a deadly possibility. And to 2 take it very seriously. Not to do anything. 3 Q. Did he prescribe you anything? 4 A. He sent me to Dr. Coffman at Idaho Infectious 5 Disease. 6 Q. Did he order X-rays? 7 A. Dr. Coffman did. I believe it was 8 Dr. Coffman. Over at St. Luke's Hospital. 9 Q. What did the X-rays show? 10 A. It showed the whole -- I'm trying to remember 11 accurately. It showed the toe -- because you take it 12 from an angle up. And it showed that there was 13 something going on. 14 Q. Did Dr. Nielsen ever prescribe you antifungal 15 cream? 16 A. I do not believe so. I don't remember. I do 17 not think so. I should just say I don't remember. 18 Q. Did anyone go with you to Dr. Nielsen? 19 A. No. 20 Q. So Dr. Nielsen referred you to Dr. Coffman? 21 A. Idaho Infectious Disease; yes. 22 Q. Other than MRSA did Dr. Nielsen give you any 23 alternative diagnoses? 24 A. At that point I was referred to Idaho 25 Infectious Disease. They transferred everything.</p>

<p style="text-align: right;">97</p> <p>1 Q. Around the time of your appointment with 2 Dr. Coffman did you fill out a form indicating health 3 conditions and symptoms that you have experienced? 4 A. You know, I don't remember. 5 Q. I'm referring to your medical records and a 6 form that was included in your medical records. 7 Plaintiff's 59 through 63. 8 MR. WRIGHT: It's a Sawtooth Epidemiology and 9 Infectious Disease record dated December 14, 2010. And 10 I understand that you are not planning to introduce this 11 as an exhibit? 12 MS. ZAVIDOW: I am not. I am just referring 13 to it. 14 MR. JACOBSON: Very good. Go ahead, Counsel. 15 Q. (BY MS. ZAVIDOW) I see from the form that you 16 experienced a number of symptoms in the past. If you 17 could read the list of symptoms that you experienced. I 18 have it as starting with heartburn. Do you not have the 19 same form? 20 MR. WRIGHT: I believe it is a series of 21 checked conditions; is that right? 22 MS. ZAVIDOW: Yes. 23 MR. JACOBSON: All right. We are on the same 24 page now. 25 Q. (BY MS. ZAVIDOW) Can you just verify for me</p>	<p style="text-align: right;">99</p> <p>1 checked items? 2 A. High blood pressure, heart racing or thumping, 3 muscle weakness, joint pain, joint swelling, neck 4 stiffness, back pain, red warm joints, depression, panic 5 attacks, anxiety, poor sleep, bleeding, bruising 6 tendency, rash, psoriasis, night sweats, frequent 7 urination, numbness or tingling, imbalance or 8 unsteadiness, weakness, blurred vision, decreased 9 hearing, hoarseness, teeth problems, sinus infection, 10 fatigue, and weight loss or gain. 11 If I may state, to go along with a lot of 12 those symptoms, the beginning stages of menopause had a 13 lot to do with some of these. 14 Q. Did you see Dr. Coffman more than once? 15 A. I did. 16 Q. How many times did you see Dr. Coffman? 17 A. I believe I saw him two times. 18 Q. What did you explain to him were your 19 symptoms? 20 A. He saw the X-ray. I was referred by David 21 Nielsen, so I'm not sure what David had said. But we 22 really didn't talk about it. He just looked at the toe 23 and sent me to the hospital. As he and David Nielsen 24 had already talked. 25 Q. What did he tell you about your condition?</p>
<p style="text-align: right;">98</p> <p>1 that this is an accurate record of your past history. I 2 see that you checked heartburn; is that correct? 3 A. They just said to check if you have ever had 4 any of these. And they said it doesn't matter if it was 5 once or twice. But if you have ever had it. 6 Q. Can we assume that this is an accurate 7 self-reported medical history that has been prepared by 8 you? 9 A. I very much would like to go over it. As I 10 stated, they said at any time had I ever had. Not 11 indicating whether it was ongoing, regular or -- 12 Q. Would you like a second to read it? 13 A. Yes. If I may, please. And we are just 14 talking about this page? 15 MR. JACOBSON: You are just talking about 16 Plaintiff's 63; right? 17 MS. ZAVIDOW: Yes. 18 THE WITNESS: Yes. I would like to state this 19 is accurate. However, it is not anything -- I mean, 20 they were things that had happened. A lot of them were 21 just relative to what had been going on in the last 22 month. Like the anxiety attacks. Because we didn't 23 know what it was. It just kind of bounced all over the 24 place. And I was afraid. 25 Q. (BY MS. ZAVIDOW) Can you read for me the</p>	<p style="text-align: right;">100</p> <p>1 A. He didn't at the time. He sent me to St. 2 Luke's immediately for X-rays. 3 (Exhibit 3 marked.) 4 Q. (BY MS. ZAVIDOW) Does this look familiar to 5 you? 6 A. It does look familiar. 7 Q. Do you have reason to believe that this is not 8 a valid and accurate record? 9 A. I would like to read it, if I may, please. 10 Q. Yes. 11 A. Okay. I have read it. 12 Q. Please turn to page two. Can you read the 13 sentence in the first paragraph beginning with the word 14 "She"? 15 A. "She has no open sores this time and certainly 16 no plantar ulcerations. I do not believe she takes any 17 medication on a regular basis. She is on a number of 18 over-the-counter supplements. She has had a nares swab 19 that is negative for MRSA. She carries an antecedent 20 history of asthma, psoriasis, reflux disease, eczema, 21 and mitral valve prolapse. She occasionally has issues 22 with sinusitis." 23 Q. Referring to the history of asthma. Is that 24 an accurate statement? 25 A. There are several things in here that are not</p>

<p style="text-align: right;">101</p> <p>1 accurate. Let me come back to this.</p> <p>2 Q. When you say come back to this?</p> <p>3 A. I went back to read again. But, no, that is</p> <p>4 not accurate.</p> <p>5 Q. Would you agree you have a history of</p> <p>6 psoriasis?</p> <p>7 A. No, I don't believe I have a history of</p> <p>8 psoriasis. I have had psoriasis, but I don't have it</p> <p>9 anymore. And it didn't develop until 1991. So I don't</p> <p>10 see the history.</p> <p>11 Q. It developed in 1991 and continued for how</p> <p>12 long?</p> <p>13 MR. JACOBSON: Objection; asked and answered.</p> <p>14 You can go ahead and answer again.</p> <p>15 THE WITNESS: I would say within maybe -- this</p> <p>16 is a recollection. I'm not absolutely sure. Two years,</p> <p>17 maybe. And then I had a small patch up here at the</p> <p>18 hairline that would act up on occasion. And I haven't</p> <p>19 had that for months.</p> <p>20 Q. (BY MS. ZAVIDOW) How many months?</p> <p>21 A. Oh, probably at least eight or nine months.</p> <p>22 Where I used to have it when I would get stressed.</p> <p>23 Q. Do you have a history of reflux disease?</p> <p>24 A. I do not.</p> <p>25 Q. Do you have a history of eczema?</p>	<p style="text-align: right;">103</p> <p>1 A. He sent me to the dermatologist. That was the</p> <p>2 last time I had any contact with him.</p> <p>3 Q. Did you at any time take psoriasis</p> <p>4 medications?</p> <p>5 A. No.</p> <p>6 Q. I have here a record. Plaintiff's 176 to 178.</p> <p>7 A record from Dr. Steven Mings dated 12-16-10. I see</p> <p>8 from this record that Dr. Mings has said that you have</p> <p>9 had psoriasis for about 21 years, but have had IT under</p> <p>10 control with diet and Clobetasol. Is that correct?</p> <p>11 A. That would have probably been 19 years at that</p> <p>12 time. Because it developed in 1991. So about 19 years</p> <p>13 at that point. Clobetasol is a topical medication that</p> <p>14 you -- it's a topical steroid you put on when it first</p> <p>15 acts up and it gets rid of the symptoms.</p> <p>16 Q. Would it be more accurate that you did use</p> <p>17 medication for psoriasis?</p> <p>18 MR. JACOBSON: Object to the form.</p> <p>19 Q. (BY MS. ZAVIDOW) Did you use medication for</p> <p>20 psoriasis, including a topical medication?</p> <p>21 A. From time to time I used a topical solution if</p> <p>22 it flared up at my hairline only.</p> <p>23 Q. I see here from Dr. Mings note that you have</p> <p>24 been having flare-ups of psoriasis for the last few</p> <p>25 months and you were told by your doctor that this might</p>
<p style="text-align: right;">102</p> <p>1 A. No eczema at all. I had psoriasis.</p> <p>2 Q. Mitral valve prolapse?</p> <p>3 A. I was diagnosed with that when I was 23. And</p> <p>4 when I went back there was no -- well, excuse me.</p> <p>5 Somewhere around 23 or 24. And I have had no other</p> <p>6 occurrences. And I have had heart tests and whatnot.</p> <p>7 Q. Can you please read under "Impression"?</p> <p>8 A. "Question osteomyelitis versus psoriatic</p> <p>9 disease versus I guess a remote possibility would be</p> <p>10 inflammatory bowel disease-related arthritis. I tend to</p> <p>11 actually favor psoriatic disease at this juncture. We</p> <p>12 will repeat X-rays today."</p> <p>13 Q. Thank you. That's good enough. Is it your</p> <p>14 recollection that Dr. Coffman believes that it was</p> <p>15 psoriatic disease?</p> <p>16 MR. JACOBSON: Object to the form.</p> <p>17 Q. (BY MS. ZAVIDOW) What did Dr. Coffman</p> <p>18 diagnose you with?</p> <p>19 A. He didn't actually give me a diagnosis. He</p> <p>20 said -- he called me during treatment and asked me to</p> <p>21 tell him about my psoriasis. And I said, "What?" And</p> <p>22 he said, "Take the PICC line out and go down to see</p> <p>23 Dr. Mings."</p> <p>24 Q. Did he explain to you why he wanted you to</p> <p>25 tell him about your psoriasis?</p>	<p style="text-align: right;">104</p> <p>1 be related. Is that accurate?</p> <p>2 A. "This" being what?</p> <p>3 Q. I believe that Dr. Mings is referring to your</p> <p>4 foot problem. Your toe problem.</p> <p>5 A. They went down that avenue for a while; yes.</p> <p>6 Q. Is it accurate to say you had been having</p> <p>7 flare-ups of psoriasis around that time?</p> <p>8 A. I had it at my hairline. Not in my foot or</p> <p>9 any other place.</p> <p>10 Q. Is it accurate to say you were told by the</p> <p>11 doctor that it might be related?</p> <p>12 A. That part is accurate; yes.</p> <p>13 Q. I see also from your past medical history that</p> <p>14 one of the conditions checked is joint or</p> <p>15 musculoskeletal symptoms.</p> <p>16 A. That was as a result of the foot.</p> <p>17 Q. That is what that is referring to?</p> <p>18 A. Yes.</p> <p>19 Q. Did you have any joint or musculoskeletal</p> <p>20 symptoms before the date of the pedicure that forms the</p> <p>21 basis for this action?</p> <p>22 A. No.</p> <p>23 Q. I see from the notes also that Dr. Mings</p> <p>24 relates that you had a history of basal cell carcinoma;</p> <p>25 is that correct?</p>

<p style="text-align: right;">105</p> <p>1 A. I had a possibility of it. They didn't want 2 it to turn into that, so they had taken it out. 3 Q. Who was the doctor you saw for that? 4 A. Dr. Burr. I believe it is Raymond Burr. 5 MS. ZAVIDOW: Counsel, is that included in the 6 medical records that you were getting ready to prepare 7 for us? 8 MR. JACOBSON: To be honest, Counsel, I can't 9 say for sure. If it is it will be there. If not I 10 believe we executed a release and will provide that. We 11 would also request any copies of any records that you 12 have that we haven't yet received. 13 MS. ZAVIDOW: Sure. 14 Q. (BY MS. ZAVIDOW) I see also see here that 15 Dr. Mings assessed you with psoriatic sausage digit and 16 said it was a chronic problem. Do you recollect that? 17 A. I do. He did. 18 Q. Did Dr. Mings refer you to anyone? 19 A. He did not. 20 Q. Did he provide you any treatment? 21 A. I don't remember exactly. I received an 22 injection. And I believe he felt -- I don't remember. 23 I'll have to go back and check for sure. 24 Q. Did Dr. Mings tell you anything was wrong with 25 your big right toe at that time? What, if anything, was</p>	<p style="text-align: right;">107</p> <p>1 and no real diagnosis. He actually said, "I have not 2 seen anything like this." 3 Q. Was it your position that Dr. Chandler did 4 rule out arthritic causes? 5 A. We then went from there -- at that particular 6 point he said, "I don't see any inflammation in the 7 joint." And I did go to a psoriatic arthritis -- or a 8 specialist to rule that out. 9 (Exhibit 4 marked.) 10 Q. (BY MS. ZAVIDOW) Does this record look 11 familiar to you? 12 A. Somewhat. I'm reviewing it right now. Where 13 is the date on this document? 14 MR. JACOBSON: She is not here to answer 15 questions. 16 THE WITNESS: This information for the most 17 part looks accurate. 18 Q. (BY MS. ZAVIDOW) This is an Active Problem 19 List and a record of other conditions. Does it look 20 familiar? 21 A. It looks familiar. But not as an active, 22 ongoing record. Again, I was asked, "Have you ever 23 had?" And there is some things in here that they must 24 be pulling from another doctor report. 25 Q. Under "Notes" can you please read the last</p>
<p style="text-align: right;">106</p> <p>1 wrong with your big right toe? 2 A. He stated that -- I don't remember exactly. 3 He did mention something, but I don't remember exactly. 4 I'm sorry. 5 Q. Do you recall him mentioning that he thought 6 you might have psoriatic disease? 7 A. I don't remember him saying it. But I know it 8 was brought up somewhere in the scope of doctors. 9 Q. Did you, while seeing Dr. Mings, decline to 10 have a biopsy of your toe? 11 A. I don't recall him asking for a biopsy. 12 Q. Do you recall seeing Dr. Chandler? 13 A. Yes, I do. 14 Q. How often did you see Dr. Chandler? 15 A. Multiple times. I don't remember. 16 Q. What kind of doctor is Dr. Chandler? 17 A. He's a podiatrist. 18 Q. What was the diagnosis of Dr. Chandler? 19 A. The final diagnosis? 20 Q. Interim and final. 21 A. Interim, just at a loss for what was going on. 22 We didn't really have a diagnosis and were trying to 23 figure things out through a process of -- we did a 24 couple of procedures to rule out arthritis. There was 25 actually five procedures done within a course of a year</p>	<p style="text-align: right;">108</p> <p>1 paragraph? 2 A. "She has been seen by podiatry, ID, and 3 dermatology. She elected to not use an oral antifungal 4 and possibly used Vicks. The nail is growing. Because 5 of the psoriatic arthritis and acute inflammation it 6 appears that she may have damaged the nail matrix and 7 will have a deformed nail. This was discussed with her 8 today." 9 Q. Does that sound familiar? 10 A. Somewhat. 11 Q. Do you recall discussing with Dr. Nielsen that 12 you might have damaged the nail matrix and will have a 13 deformed nail? 14 A. No. I would need to know the date of this. 15 Because I know the date I saw Dr. Nielsen and there was 16 no discussion about that, to my knowledge. That I 17 remember. 18 Q. Can you please read the first paragraph under 19 "Notes"? 20 A. "Tracy is very emotional and tearful. 21 Reporting openly that she feels depressed and needs 22 help. She denies use of SI/HL. She is receptive to use 23 of an antidepressant." 24 Q. Does this sound familiar? 25 A. Yes, it does.</p>

<p style="text-align: right;">109</p> <p>1 Q. You were experiencing an emotional state at 2 the time that you saw Dr. Nielsen? 3 A. Absolutely. Because nobody could figure out 4 what was wrong with my toe and just told me to live with 5 it. 6 Q. Did you feel depressed at that time? 7 A. That would depress anybody; yes. 8 Q. Did you start using an antidepressant? 9 A. I do not recall the date. 10 Q. But you did start using one? 11 A. I'm not sure if it was an antidepressant or -- 12 I believe it to be an anti-anxiety. I was told by Dr. 13 Nielsen that anxiety can bring on depression. 14 Q. Do you recall being told by Dr. Nielsen that 15 you were encouraged to increase your activity? 16 A. No, I do not. I have always been very active. 17 Q. Do you recall discussing with Dr. Terry 18 Ribbens that you had pain in your ankle or foot joint? 19 A. In my foot. 20 Q. Did you have pain in your ankle at that time? 21 A. No. A couple of times there may have been 22 stiffness in the ankle, because I had been wearing a 23 boot and just non-activity. But not anything ongoing. 24 Q. Were you active at that time? 25 A. At that time, no, I was not.</p>	<p style="text-align: right;">111</p> <p>1 Dr. Mings. I see from this record that Dr. Mings 2 considered a biopsy. And he discussed the biopsy with 3 you, but you declined. Does this refresh your 4 recollection? 5 A. I'm sorry. I'm reading it right now. That 6 wasn't for the toe. That was for the two plaque. What 7 he is referring to as plaque. Because in the past when 8 my psoriasis would act up I would use the Clobetasol and 9 it went away. 10 Q. I see. Do you recall the Institute for 11 Podiatric Pathology performing a stain for fungi and 12 getting a negative result? 13 A. I believe that is a laboratory out of state. 14 Q. Do you remember a negative result for a fungus 15 test? 16 A. There were multiple tests done at different 17 times. Some through St. Luke's. Some through 18 Dr. Chandler. And I don't recall exactly. 19 MR. WRIGHT: We have been rolling here for a 20 little over an hour. Shall we take a break? 21 MR. JACOBSON: Sure. 22 (Recess.) 23 Q. (BY MS. ZAVIDOW) Ms. Sales, do you recall an 24 appointment with Dr. Chandler during which Dr. Chandler 25 recommended that you take antifungals -- or use</p>
<p style="text-align: right;">110</p> <p>1 Q. Were you encouraged to be active by any of 2 your providers? 3 A. No. I couldn't be active at that point. 4 Q. Do you recall discussing with Dr. Terry 5 Ribbens the fact that you had red plaque on your legs? 6 Irritated areas on your legs which were one to two 7 centimeters in size? 8 A. What was the date on that? 9 Q. March 2, 2011. Plaintiff 30 through 32. 10 A. I'm trying to remember the date. I had two 11 like sores. One right about the knee and one on the 12 upper thigh. At that time they seemed really weird. 13 But I didn't feel it was a skin cancer. I was just 14 concerned. I think at that point I was just concerned 15 about multiple things because of what was going on. 16 Q. Do you recall Dr. Ribbens telling you that 17 psoriatic arthritis was a possibility because of the 18 plaque on your legs and your partial response to the 19 medication that you had been prescribed? 20 A. No. No, I do not. 21 Q. Do you recall Dr. Mings recommending a biopsy 22 of your toe in March of 2011? 23 A. I think I said earlier I don't remember him 24 asking for a biopsy. 25 Q. This is Plaintiff 179. 03-07-11. This was</p>	<p style="text-align: right;">112</p> <p>1 antifungals? 2 MR. JACOBSON: Object to the form. Just with 3 the term "antifungals." 4 Q. (BY MS. ZAVIDOW) Antifungal medication? 5 A. I do not recall. I had multiple visits with 6 him. And I just do not remember that. 7 Q. Do you recall telling him that you would not 8 fill the prescription because of expense? 9 A. You know, I cannot be absolutely sure about 10 that. I can speculate. 11 Q. Do you recall speaking with Dr. Terry Ribbens 12 about changes to all of the toes on your right foot 13 around -- this visit occurred in July 2011? 14 A. Yes, I do. 15 Q. Can you explain to me what was going on with 16 your foot at that time? 17 A. The toe still was going on, but it seemed like 18 the toes were swollen compared to the other side. I'm 19 sorry, what was the date again, please? 20 Q. July 12, 2011. 21 A. I mean yes, it still is that way somewhat. 22 Q. Do you recall him saying that because the 23 other toes are involved then there is more concern about 24 it being psoriatic arthritis? 25 A. No.</p>

<p style="text-align: right;">113</p> <p>1 Q. What kind of improvement did you have with the</p> <p>2 various treatments you were provided by Dr. Chandler?</p> <p>3 A. Specifically what?</p> <p>4 Q. I'll withdraw that. Do you recall being seen</p> <p>5 by Dr. Julie Madsen?</p> <p>6 A. Yes, I do.</p> <p>7 Q. How many times were you seen by Dr. Madsen?</p> <p>8 A. You know, pertaining to this case, with my</p> <p>9 toe, once.</p> <p>10 Q. Did you see Dr. Madsen for other purposes?</p> <p>11 A. She is a PA at the St. Luke's Family Physician</p> <p>12 on Parkcenter Boulevard where I was going.</p> <p>13 Q. She's a PA?</p> <p>14 A. Yes.</p> <p>15 Q. Do you recall Dr. Madsen discussing with you</p> <p>16 that you might have chronic refractory osteomyelitis?</p> <p>17 A. No. Excuse me. Dr. Madsen was with Elks</p> <p>18 Wound Center. Not St. Luke's. I'm thinking of Mary</p> <p>19 Mebane. I apologize. I did see this doctor. I believe</p> <p>20 she was my initial doctor there. And I may have seen</p> <p>21 her one other time. And I do not recall them ever</p> <p>22 saying anything about that, because they were perplexed.</p> <p>23 Q. Your records reflect correspondence with your</p> <p>24 health insurer about hyperbaric oxygen therapy. Was</p> <p>25 there ever approval for the hyperbaric oxygen therapy?</p>	<p style="text-align: right;">115</p> <p>1 sleeping?</p> <p>2 A. If the sheet came across my toe it was very</p> <p>3 painful. Or if you turned over. Any movement.</p> <p>4 Q. Do you recall discussing with Dr. Chandler in</p> <p>5 September of 2011 that you had a very sore ingrown toe?</p> <p>6 A. No, I do not.</p> <p>7 Q. Do you recall discussing that you stubbed your</p> <p>8 toe?</p> <p>9 A. September 2011?</p> <p>10 Q. Yes.</p> <p>11 MR. JACOBSON: Is there a specific record,</p> <p>12 Counsel, that you are referring to?</p> <p>13 MS. ZAVIDOW: Yes. 09-30-2011. Our number</p> <p>14 is 210.</p> <p>15 MR. WRIGHT: Dr. Jeffrey Chandler.</p> <p>16 September 30, 2011. It's a progress note.</p> <p>17 THE WITNESS: If that is what he has got down</p> <p>18 there, then that is accurate.</p> <p>19 Q. (BY MS. ZAVIDOW) Do you remember which toe</p> <p>20 that was?</p> <p>21 A. The right toe. The big toe.</p> <p>22 Q. Did Dr. Chandler say that that exacerbated --</p> <p>23 that it made your injury worse?</p> <p>24 A. Everything was done by then. That was about</p> <p>25 four surgeries into it by that point. No, he did not.</p>
<p style="text-align: right;">114</p> <p>1 A. No, there was not.</p> <p>2 Q. Do you recall Dr. Ribbens saying that cycling</p> <p>3 would help you regarding the exercise of your toe?</p> <p>4 A. Not in that context; no. Never did he say</p> <p>5 that would help the toe; no.</p> <p>6 Q. Do you recall discussing with him the changes</p> <p>7 that occurred to all of the toes on your right foot?</p> <p>8 A. Yes. At one point, yes. They're not</p> <p>9 permanent.</p> <p>10 Q. Do you recall Dr. Raymond Otto at the Elks</p> <p>11 Wound Center diagnosing you with chronic refractory</p> <p>12 osteomyelitis?</p> <p>13 A. I don't remember the exact terminology that he</p> <p>14 used. He is the first person that saw the</p> <p>15 osteomyelitis.</p> <p>16 Q. I see from the medical records that you have</p> <p>17 an increase in pain depending on your level of activity.</p> <p>18 What kind of activities did you engage in that caused</p> <p>19 you more pain?</p> <p>20 A. Standing up and walking. Sometimes sleeping.</p> <p>21 Q. Sleeping?</p> <p>22 A. Um-hmm.</p> <p>23 MR. JACOBSON: Is that a "yes"?</p> <p>24 THE WITNESS: Yes. Excuse me.</p> <p>25 Q. (BY MS. ZAVIDOW) How were you caused pain by</p>	<p style="text-align: right;">116</p> <p>1 Q. When you say everything was done by then, what</p> <p>2 do you mean?</p> <p>3 A. I thought all of the surgeries had taken</p> <p>4 place. Well, I still had another surgery after that</p> <p>5 one.</p> <p>6 Q. Are you a diabetic?</p> <p>7 A. No, I am not.</p> <p>8 Q. Would you dispute any record that said you</p> <p>9 were a diabetic?</p> <p>10 A. Absolutely.</p> <p>11 Q. Did you have difficulty walking around this</p> <p>12 time period?</p> <p>13 A. Which time period?</p> <p>14 Q. October of 2011?</p> <p>15 A. Yes.</p> <p>16 Q. Do you recall seeing Dr. Wyatt at Sawtooth</p> <p>17 Epidemiology and Infectious Diseases?</p> <p>18 A. Yes, I do.</p> <p>19 Q. Do you recall discussing with Dr. Wyatt the</p> <p>20 fact that she thought the infection in your toe occurred</p> <p>21 as a secondary process from prior manipulation and was</p> <p>22 not the primary inciting event?</p> <p>23 A. No, I do not.</p> <p>24 (Exhibit 5 marked.)</p> <p>25 Q. (BY MS. ZAVIDOW) Ms. Sales, will you please</p>

<p style="text-align: right;">117</p> <p>1 read from where it says, "She did recently completed"?</p> <p>2 A. "She did recently completed a prolonged course</p> <p>3 of nafcillin for an osteomyelitis from S. Warneri, but I</p> <p>4 think that this infection occurred as a secondary</p> <p>5 process from prior manipulation and was not the primary</p> <p>6 inciting event. She has cutaneous psoriasis and my</p> <p>7 concern is that she has underlying psoriatic arthritis</p> <p>8 that was causing the initial inflammation and continues</p> <p>9 to prevent her to recover fully. This is detailed in my</p> <p>10 note. Please contact me if you have additional</p> <p>11 questions."</p> <p>12 Q. Thank you.</p> <p>13 A. I have never seen this.</p> <p>14 Q. Do you recognize your name at the top?</p> <p>15 A. Yes, I do.</p> <p>16 Q. Do you recognize the name John Ader, DO?</p> <p>17 A. Yes, I do.</p> <p>18 Q. Do you have any reason to dispute the validity</p> <p>19 of this record?</p> <p>20 A. That is her opinion.</p> <p>21 Q. But you don't have any reason to dispute the</p> <p>22 validity of the record itself?</p> <p>23 A. Meaning what exactly?</p> <p>24 Q. This is not a record that you question whether</p> <p>25 it is real or not?</p>	<p style="text-align: right;">119</p> <p>1 the lines of what she was trying to say.</p> <p>2 Q. Do you recall discussing a surgical history of</p> <p>3 a right toe biopsy?</p> <p>4 A. With Dr. Ader?</p> <p>5 Q. Yes.</p> <p>6 A. No, I don't recall talking to him about</p> <p>7 surgeries. I can't remember.</p> <p>8 (Exhibit 6 marked.)</p> <p>9 Q. (BY MS. ZAVIDOW) Does this document look</p> <p>10 familiar?</p> <p>11 A. I don't recall seeing it before. But I know</p> <p>12 Saltzer Medical Group.</p> <p>13 Q. Do you see your name at the top?</p> <p>14 A. Yes, I do.</p> <p>15 Q. Do you see that these are the progress notes</p> <p>16 of Dr. Ader?</p> <p>17 A. Apparently.</p> <p>18 Q. Do you have any reason to dispute that these</p> <p>19 are the records of Dr. Ader?</p> <p>20 A. I have no reason to at this point; no.</p> <p>21 Q. Will you please read the item under "Surgical</p> <p>22 History"?</p> <p>23 A. "Right toe biopsy 2007/2011. Cyst removed -</p> <p>24 oblition 5/2009."</p> <p>25 Q. Do you have any understanding of what he was</p>
<p style="text-align: right;">118</p> <p>1 MR. JACOBSON: Counsel, are you referring to</p> <p>2 whether or not the document is actually a product of</p> <p>3 Dr. Wyatt?</p> <p>4 MS. ZAVIDOW: The document is actually a</p> <p>5 product of Dr. Wyatt.</p> <p>6 THE WITNESS: That she wrote this up to the</p> <p>7 other doctor?</p> <p>8 MS. ZAVIDOW: Yes.</p> <p>9 THE WITNESS: No, I'm not disputing that.</p> <p>10 MS. ZAVIDOW: Thank you.</p> <p>11 Q. (BY MS. ZAVIDOW) Do you recall seeing</p> <p>12 Dr. Ader?</p> <p>13 A. Yes, I do.</p> <p>14 Q. How many times did you see Dr. Ader?</p> <p>15 A. I saw him one time.</p> <p>16 Q. Did Dr. Ader reach a diagnosis?</p> <p>17 A. Yes, he did.</p> <p>18 Q. What was his diagnosis?</p> <p>19 A. Excuse me. I don't know if it is actually a</p> <p>20 diagnosis. But he told me his opinion and what he felt.</p> <p>21 Q. What did he feel?</p> <p>22 A. That it was not psoriatic arthritis or</p> <p>23 anything pertaining to that. It would not be specific</p> <p>24 of that joint without it being in other areas. And I</p> <p>25 was very limber and no swelling. And it didn't follow</p>	<p style="text-align: right;">120</p> <p>1 referring to?</p> <p>2 A. Actually, the oblition and right toe biopsy</p> <p>3 2007; no. I don't know what he is referring to. Or</p> <p>4 exactly what he is saying. And, yes, I did have a</p> <p>5 cyst -- an oblition done in May of 2009.</p> <p>6 Q. If you could read under "History of Present</p> <p>7 Illness" where it starts "She was diagnosed with</p> <p>8 psoriasis in 1990."</p> <p>9 A. "She was diagnosed with psoriasis in 1990</p> <p>10 after childbirth. The lesions resolved with a special</p> <p>11 diet. The lesions flared when she was treated with</p> <p>12 antibiotics."</p> <p>13 Q. That's fine. Thank you. Do you recall</p> <p>14 discussing this with Dr. Ader?</p> <p>15 A. Yes.</p> <p>16 Q. Did you communicate to Dr. Ader that it was</p> <p>17 your impression that your lesions flared when treated</p> <p>18 with antibiotics?</p> <p>19 A. I don't recall having that conversation with</p> <p>20 him.</p> <p>21 Q. Did your lesions flare when you are treated</p> <p>22 with antibiotics?</p> <p>23 A. Yes, they did.</p> <p>24 Q. Were they flaring at the time you received the</p> <p>25 treatment from various providers with antibiotics?</p>

<p style="text-align: right;">121</p> <p>1 A. At times with antibiotics.</p> <p>2 Q. Do you recall discussing with any providers a</p> <p>3 presentation of psoriasis on your elbow?</p> <p>4 A. Not specifically.</p> <p>5 Q. Have you continued to receive treatment</p> <p>6 anywhere since your visit with Dr. Ribbens on October 8</p> <p>7 2012?</p> <p>8 A. No. And that was just a general follow-up</p> <p>9 doctor's appointment.</p> <p>10 Q. What has happened with your toe since then?</p> <p>11 A. Nothing. It stays in the condition that it is</p> <p>12 in.</p> <p>13 Q. What condition is it in?</p> <p>14 A. I guess what they term "the new normal." I'm</p> <p>15 not sure.</p> <p>16 Q. Do you have pain in your toe right now?</p> <p>17 A. Not right now. Not at this point sitting</p> <p>18 here.</p> <p>19 Q. If not in this room, within the last few days?</p> <p>20 A. I randomly have pain.</p> <p>21 Q. Do activities make your pain worse?</p> <p>22 A. I hadn't really thought about it. I don't pay</p> <p>23 much attention to it. I don't know.</p> <p>24 Q. Can you identify certain activities that you</p> <p>25 think make your pain worse?</p>	<p style="text-align: right;">123</p> <p>1 A. Yes, he did.</p> <p>2 Q. What is that surgery?</p> <p>3 A. That would be cutting the toe off below the</p> <p>4 joint. So here is where the toe attaches (indicating).</p> <p>5 And this being the joint they would cut it here, and</p> <p>6 they would cut it here, and take the joint out. Put the</p> <p>7 toe back on. And put a screw back in it.</p> <p>8 Q. When did he discuss this with you?</p> <p>9 A. We had discussed it in 2011. We were opting</p> <p>10 to try other procedures in lieu of that. We didn't want</p> <p>11 to amputate the toe, because it is a balance toe. It</p> <p>12 has been a process of evaluations. And I believe the</p> <p>13 last time we spoke of it, and I'm not sure exactly the</p> <p>14 date, but I believe it may have been September or</p> <p>15 October of 2012 about performing that surgery. And that</p> <p>16 it would be a six month -- excuse me, a six-week</p> <p>17 recovery. And we weren't sure if that would change</p> <p>18 anything.</p> <p>19 Q. What is your understanding of how successful</p> <p>20 that surgery would likely be?</p> <p>21 A. I'm not clear where you are going?</p> <p>22 Q. What would it do for your pain?</p> <p>23 A. I have no idea.</p> <p>24 Q. Did Dr. Chandler discuss with you the</p> <p>25 likelihood that it would reduce your pain below what it</p>
<p style="text-align: right;">122</p> <p>1 A. There are activities I don't even attempt</p> <p>2 because it's been a long time. I have not done a lot of</p> <p>3 strenuous activities.</p> <p>4 Q. Are you presently taking any medication for</p> <p>5 your toe?</p> <p>6 A. No, I am not.</p> <p>7 Q. Are you using any antifungals?</p> <p>8 A. No, I am not.</p> <p>9 Q. I should say antifungal medications?</p> <p>10 A. No. They are very hard on the organs.</p> <p>11 Q. As you sit here today what is your</p> <p>12 understanding as to the prognosis of your toe?</p> <p>13 A. I don't have a clear definite prognosis or</p> <p>14 understanding about it. It is what it is.</p> <p>15 Q. Have you been told by anyone at any point that</p> <p>16 you will need additional surgery or additional</p> <p>17 treatment?</p> <p>18 A. There had been an additional surgery talked</p> <p>19 about. But it is not definite. Nobody knows at this</p> <p>20 point. And so it would be basically a guess.</p> <p>21 Q. You say that additional surgery was talked</p> <p>22 about. Who spoke about it with you?</p> <p>23 A. Dr. Chandler.</p> <p>24 Q. Did Dr. Chandler identify for you what what</p> <p>25 surgery would consist of?</p>	<p style="text-align: right;">124</p> <p>1 is now?</p> <p>2 A. He was guessing that it still might be the</p> <p>3 fungus in the joint based upon the last X-ray. And that</p> <p>4 the only way -- at that point he felt if we got rid of</p> <p>5 the joint and the fungus that we wouldn't have any more</p> <p>6 inflammation. It was his belief that that would do it,</p> <p>7 but he was not 100-percent sure. Because we are just</p> <p>8 figuring it out.</p> <p>9 Q. Has anyone given you any other nonsurgical</p> <p>10 treatment options that you could use in the future?</p> <p>11 A. Dr. Otto at the Elks Wound Center. The</p> <p>12 hyperbarics.</p> <p>13 Q. Other than the hyperbaric chamber are there</p> <p>14 any other recommendations made to you by any of your</p> <p>15 providers?</p> <p>16 A. No, there is not.</p> <p>17 Q. Are you currently on any restrictions or</p> <p>18 limitations regarding what you can and cannot do</p> <p>19 physically?</p> <p>20 A. My own personal. According to how I feel and</p> <p>21 my core strength.</p> <p>22 Q. But no providers have imposed any limitations</p> <p>23 or restrictions on you?</p> <p>24 A. No, they have not.</p> <p>25 Q. Are you presently able to work full time?</p>

<p style="text-align: right;">125</p> <p>1 A. Yes.</p> <p>2 Q. Are you able to clean your house?</p> <p>3 A. Yes.</p> <p>4 Q. Are you able to clean the houses of your</p> <p>5 clients?</p> <p>6 A. Yes.</p> <p>7 Q. Are you able to do yard work?</p> <p>8 A. Yes.</p> <p>9 Q. Are you able to run?</p> <p>10 A. I would say not yet.</p> <p>11 Q. Are you able to walk?</p> <p>12 A. I can walk; yes.</p> <p>13 Q. Are you able to drive a car?</p> <p>14 A. Yes.</p> <p>15 Q. Other than correspondence with your counsel</p> <p>16 have you ever written down any thoughts, impressions or</p> <p>17 issues which occurred in this case? For example, a</p> <p>18 diary?</p> <p>19 A. No, I have not.</p> <p>20 Q. Have you done independent research about your</p> <p>21 condition?</p> <p>22 A. Yes, I have.</p> <p>23 Q. What kind of research?</p> <p>24 A. Online. And I have two friends. Well, I have</p> <p>25 multiple friends and multiple contacts who are</p>	<p style="text-align: right;">127</p> <p>1 Q. Would her name be recorded in any business</p> <p>2 records?</p> <p>3 A. No. I can ask her. She lives down the street</p> <p>4 from me.</p> <p>5 Q. Do you have the names of any other individuals</p> <p>6 who might know about your damages, your recovery, your</p> <p>7 treatments?</p> <p>8 A. As far as what I have gone through?</p> <p>9 Q. Yes.</p> <p>10 A. Yes. I have multiple.</p> <p>11 Q. Can you name some of them?</p> <p>12 A. Where to start? James Jacobson. Hermine</p> <p>13 Weiser. Steve Weiser. Kyle and Lindsay Sales. Franz</p> <p>14 and Cecelia Weiser. Erik Sales. Joel Sales. Jack and</p> <p>15 Joyce Sales. Jeb Sales. Jeff Sales. Jerry Bricker.</p> <p>16 J.B. Bricker. Leif Edmonds. Dr. Chandler. Deborah</p> <p>17 Hoburg. Janell Okenaka. Sheila Lorrain. David and</p> <p>18 Goldie Barclay. Bill and Robin Stroud. Jennifer and</p> <p>19 Terry McIntee. James Hayes. Jessica and Bill White.</p> <p>20 Jeff and Connie. Gale and Bob Dylan. Neil and Michelle</p> <p>21 Marlette.</p> <p>22 MR. JACOBSON: It's not "the" Bob Dylan.</p> <p>23 Just to clarify.</p> <p>24 THE WITNESS: Dana Weiser, Conrad Weiser,</p> <p>25 Jackie Weiser. There are multiple. A lot of people</p>
<p style="text-align: right;">126</p> <p>1 specialists in this field regarding cases down in</p> <p>2 California. I have done extensive research.</p> <p>3 Q. Who is your best friend?</p> <p>4 A. My best friend is Laura Collister.</p> <p>5 Q. Have you discussed the condition of your toe</p> <p>6 with Laura Collister?</p> <p>7 A. Absolutely.</p> <p>8 Q. Was she present during any of your treatments?</p> <p>9 A. No.</p> <p>10 Q. Following the event of April 19, 2010, which</p> <p>11 friends, coworkers, neighbors, family members would have</p> <p>12 any knowledge of any aspect of the incident, or your</p> <p>13 recovery, or your damages? Not including the people</p> <p>14 that we have talked about already here today.</p> <p>15 A. There are multiple people that are aware of</p> <p>16 what I have gone through. I have not spoken to anybody</p> <p>17 about any damages or anything pending. Or even the</p> <p>18 facility where I was or who did it. There was one</p> <p>19 person that knows that, because she's a mutual friend of</p> <p>20 Linda's and mine.</p> <p>21 Q. Who is that?</p> <p>22 A. Claire. I'm not sure what her last name is</p> <p>23 right now. She has been married more than twice.</p> <p>24 Q. Do you sell products to Claire?</p> <p>25 A. No, I do not.</p>	<p style="text-align: right;">128</p> <p>1 know about what happened.</p> <p>2 Q. (BY MS. ZAVIDOW) Did you have health</p> <p>3 insurance at the time that this incident occurred in</p> <p>4 April of 2010?</p> <p>5 A. Yes, I did.</p> <p>6 Q. Who is it through?</p> <p>7 A. That would be Pacific Source.</p> <p>8 Q. Have you continued to have health insurance</p> <p>9 through now?</p> <p>10 A. Yes, I do.</p> <p>11 Q. I'm trying to get some idea of your personal</p> <p>12 and out-of-pocket expenses as a result of this accident.</p> <p>13 MR. JACOBSON: Counsel, maybe we could -- I</p> <p>14 don't know if this is a good stopping point. We are</p> <p>15 kind of pushing up. I know Tracy had some questions,</p> <p>16 also. If we can go off the record.</p> <p>17 (A discussion was held off the record.)</p> <p>18 MR. WRIGHT: Let the record reflect that the</p> <p>19 parties agreed to reconvene Friday, February 1st at</p> <p>20 1:30 p.m. at the current location.</p> <p>21 (Deposition was adjourned at 3:08 p.m.)</p> <p>22 (Signature requested.)</p> <p>23</p> <p>24</p> <p>25</p>

129	<p>1 CERTIFICATE OF WITNESS</p> <p>2 I, TRACY SALES, being first duly sworn, depose</p> <p>3 and say:</p> <p>4 That I am the witness named in the foregoing</p> <p>5 deposition, Volume I, consisting of pages 1 through 128;</p> <p>6 that I have read said deposition and know the contents</p> <p>7 thereof; that the questions contained therein were</p> <p>8 propounded to me; and that the answers contained therein</p> <p>9 are true and correct, except for any changes that I may</p> <p>10 have listed on the Change Sheet attached hereto:</p> <p>11 DATED this ____ day of _____, 2013.</p> <p>12 _____</p> <p>13 _____</p> <p>14 TRACY SALES</p> <p>15 _____</p> <p>16 SUBSCRIBED AND SWORN to before me this ____ day</p> <p>17 of _____, 2013.</p> <p>18 _____</p> <p>19 _____</p> <p>20 NAME OF NOTARY PUBLIC</p> <p>21 _____</p> <p>22 NOTARY PUBLIC FOR _____</p> <p>23 RESIDING AT _____</p> <p>24 MY COMMISSION EXPIRES _____</p> <p>25 _____</p>	131	<p>1 REPORTER'S CERTIFICATE</p> <p>2 I, MONICA M. ARCHULETA, CSR No. 471, Certified</p> <p>3 Shorthand Reporter, certify:</p> <p>4 That the foregoing proceedings were taken</p> <p>5 before me at the time and place therein set forth, at</p> <p>6 which time the witness was put under oath by me;</p> <p>7 That the testimony and all objections made were</p> <p>8 recorded stenographically by me and transcribed by me or</p> <p>9 under my direction;</p> <p>10 That the foregoing is a true and correct record</p> <p>11 of all testimony given, to the best of my ability;</p> <p>12 I further certify that I am not a relative or</p> <p>13 employee of any attorney or party, nor am I financially</p> <p>14 interested in the action.</p> <p>15 IN WITNESS WHEREOF, I set my hand and seal this</p> <p>16 5th day of February, 2013.</p> <p>17 _____</p> <p>18 _____</p> <p>19 _____</p> <p>20 _____</p> <p>21 MONICA M. ARCHULETA, CSR</p> <p>22 Notary Public</p> <p>23 P.O. Box 2636</p> <p>24 Boise, Idaho 83701-2636</p> <p>25 My commission expires August 3, 2018</p>
130	<p>1 ERRATA SHEET FOR TRACY SALES</p> <p>2 Page ____ Line ____ Reason for Change _____</p> <p>3 Reads _____</p> <p>4 Should Read _____</p> <p>5 Page ____ Line ____ Reason for Change _____</p> <p>6 Reads _____</p> <p>7 Should Read _____</p> <p>8 Page ____ Line ____ Reason for Change _____</p> <p>9 Reads _____</p> <p>10 Should Read _____</p> <p>11 Page ____ Line ____ Reason for Change _____</p> <p>12 Reads _____</p> <p>13 Should Read _____</p> <p>14 Page ____ Line ____ Reason for Change _____</p> <p>15 Reads _____</p> <p>16 Should Read _____</p> <p>17 Page ____ Line ____ Reason for Change _____</p> <p>18 Reads _____</p> <p>19 Should Read _____</p> <p>20 Page ____ Line ____ Reason for Change _____</p> <p>21 Reads _____</p> <p>22 Should Read _____</p> <p>23 Page ____ Line ____ Reason for Change _____</p> <p>24 Reads _____</p> <p>25 Should Read _____</p> <p>26 You may use another sheet if you need more room.</p> <p>27 WITNESS SIGNATURE _____</p>		

<p style="text-align: center;">IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA</p> <p>TRACY SALES, individually,) Plaintiff,) vs.) STACIE PEABODY, individually and) Case No. CV PI 1206516 doing business under the assumed name) VOLUME II of FINGERPRINTS DAY SPA; and LINDA) COOK, individually,) Defendants.)</p> <hr/> <p style="text-align: center;">THE CONTINUED DEPOSITION OF TRACY SALES FEBRUARY 1, 2013</p> <p>REPORTED BY: MONICA M. ARCHULETA, CSR NO. 471 NOTARY PUBLIC</p>	<p style="text-align: right;">134</p> <p style="text-align: center;">I N D E X</p> <table> <tr> <th>TESTIMONY OF TRACY SALES:</th><th>PAGE</th></tr> <tr> <td>Examination by Mr. Wright</td><td>135</td></tr> <tr> <td>Examination by Mr. Jacobson</td><td>164</td></tr> <tr> <td>Further Examination by Mr. Wright</td><td>168</td></tr> </table> <p style="text-align: center;">E X H I B I T S</p> <p style="text-align: center;">N-O-N-E</p>	TESTIMONY OF TRACY SALES:	PAGE	Examination by Mr. Wright	135	Examination by Mr. Jacobson	164	Further Examination by Mr. Wright	168
TESTIMONY OF TRACY SALES:	PAGE								
Examination by Mr. Wright	135								
Examination by Mr. Jacobson	164								
Further Examination by Mr. Wright	168								
<p style="text-align: right;">133</p> <p>1 THE CONTINUED DEPOSITION OF TRACY SALES was 2 taken on behalf of the Defendants at the offices of 3 Carey Perkins, 300 North 6th Street, Suite 200, Boise, 4 Idaho, commencing at 1:30 p.m. on February 1, 2013, 5 before Monica M. Archuleta, Certified Shorthand Reporter 6 and Notary Public within and for the State of Idaho, in 7 the above-entitled matter.</p> <p>8</p> <p>9 APPEARANCES:</p> <p>10 For the Plaintiff:</p> <p>11 JACOBSON & JACOBSON, PLLC 12 BY: MR. JAMES F. JACOBSON 13 660 E. Franklin Road, Suite 110 14 Meridian, Idaho 83642</p> <p>15</p> <p>16 For the Defendants Stacie Peabody and Fingerprints 17 Day Spa:</p> <p>18 CAREY PERKINS, LLP 19 BY: MR. TRACY L. WRIGHT 20 300 North 6th Street, Suite 200 21 P.O. Box 519 22 Boise, Idaho 83701 23 24 25</p>	<p style="text-align: right;">135</p> <p>1 TRACY SALES, 2 first duly sworn to tell the truth relating to said 3 cause, testified as follows: 4</p> <p style="text-align: center;">5 EXAMINATION</p> <p>6 QUESTIONS BY MR. WRIGHT:</p> <p>7 Q. Ms. Sales, this is continuation of your 8 deposition from a couple days ago. I will remind you 9 that you are still under oath. You understand that; 10 correct?</p> <p>11 A. Yes, I do.</p> <p>12 Q. I am Tracy Wright. I am one of the attorneys 13 representing Stacie Peabody and Fingerprints Day Spa in 14 this matter. We did meet before. But I will formally 15 introduce myself to you. I am just going to try and ask 16 you a few questions and get everybody out of here and 17 into the gorgeous sunshine as soon as possible.</p> <p>18 There were a couple of things, Ms. Sales, that 19 I didn't understand regarding your relationship with the 20 Nu Skin company. So I would like to just back up on 21 that a bit.</p> <p>22 As I understand it, at some point you were the 23 head of what you refer to as a team that sells Nu Skin 24 products; is that right?</p> <p>25 A. I was trying to build my own team; yes.</p>								

<p style="text-align: right;">136</p> <p>1 That's correct.</p> <p>2 Q. Is there any particular title that you hold as</p> <p>3 someone who is trained to build a Nu Skin sales team?</p> <p>4 A. No, there is not.</p> <p>5 Q. Did at some point have your own Nu Skin sales</p> <p>6 team?</p> <p>7 A. I started to build one; yes.</p> <p>8 Q. And when you say you started to build one.</p> <p>9 That leads me to believe that you did not have a team</p> <p>10 ever at some point.</p> <p>11 A. I had two independent distributors underneath</p> <p>12 my line.</p> <p>13 Q. And would that constitute a team? Those two</p> <p>14 independent distributors underneath your line?</p> <p>15 A. A team, in essence, that does.</p> <p>16 Q. And I believe I understood that you started to</p> <p>17 build that team in -- the first time I should say -- in</p> <p>18 late 2009 or 2010?</p> <p>19 A. I have to -- I mean, to be exact --</p> <p>20 Q. I don't need you to be exact.</p> <p>21 A. About that approximate time, yes. 2009.</p> <p>22 Maybe 2008.</p> <p>23 Q. Was Linda Cook ever a member of your team?</p> <p>24 A. No. She was there in the capacity of being an</p> <p>25 independent distributor. However, at that point I</p>	<p style="text-align: right;">138</p> <p>1 circle group volume, when Ms. Cook bought products from</p> <p>2 Nu Skin, you would receive some sort of financial gain</p> <p>3 from her buying those products; is that right?</p> <p>4 A. I would receive her points. As she generates</p> <p>5 her own volume she would get compensation. But I did</p> <p>6 not receive financial. I get -- that is part of the,</p> <p>7 like I said, circle group. And at that particular time</p> <p>8 I wasn't building. But going forward I have come to</p> <p>9 understand and chosen to go along that path.</p> <p>10 Q. I am not sure you answered my question.</p> <p>11 A. I'm sorry.</p> <p>12 Q. When Ms. Cook as a member of your circle group</p> <p>13 volume bought products from Nu Skin did you receive any</p> <p>14 sort of compensation, financial or otherwise, from that</p> <p>15 purchase by Ms. Cook?</p> <p>16 A. I would have to go back and look. I believe</p> <p>17 if I received any compensation it may have been when</p> <p>18 they offered a \$50 bonus to people if they purchased --</p> <p>19 if you referred or somebody that you knew purchased a</p> <p>20 Galvanic Spa you got a one-time bonus.</p> <p>21 Q. And when you say they offer people a \$50</p> <p>22 certificate, is that what you said?</p> <p>23 A. Or a check. I'm not sure how it came.</p> <p>24 Q. When you said they offer people that. Would</p> <p>25 you be referring to yourself?</p>
<p style="text-align: right;">137</p> <p>1 wasn't even building. I didn't have the knowledge. And</p> <p>2 I still had my cleaning business.</p> <p>3 Q. Who were the two members of your team then?</p> <p>4 The two independent distributors?</p> <p>5 A. Janell Okenaka and Deborah Hoburg that were</p> <p>6 actually distributors. Not just customers.</p> <p>7 Q. I understand. Did you ever approach Ms. Cook</p> <p>8 about becoming a member of your team? An independent</p> <p>9 distributor underneath you?</p> <p>10 A. No, I did not.</p> <p>11 Q. What is the difference between a team and a</p> <p>12 circle? You used the word circle at some point, as</p> <p>13 well?</p> <p>14 A. You can have multiple people that you would</p> <p>15 sell product to, distribute product to, or they actually</p> <p>16 have direct involvement with the company for ordering.</p> <p>17 So we are basically cutting out the middleman.</p> <p>18 Q. So those people that you just described, those</p> <p>19 would be a member of your circle?</p> <p>20 A. Circle group volume; yes.</p> <p>21 Q. And was Ms. Linda Cook ever a member of your</p> <p>22 circle group volume?</p> <p>23 A. She would be classified in that, yes, because</p> <p>24 I introduced her to Nu Skin.</p> <p>25 Q. So, as I understand it, as a member of your</p>	<p style="text-align: right;">139</p> <p>1 A. Anybody. For example, if you knew somebody</p> <p>2 and you said, "Tracy, I know somebody who wants a Spa."</p> <p>3 Then you could, actually, without even being signed up.</p> <p>4 Q. Referring only to Ms. Cook. You referred</p> <p>5 Ms. Cook to Nu Skin; am I right?</p> <p>6 A. I guess that's correct; yes.</p> <p>7 Q. So that \$50 remuneration, whatever it was,</p> <p>8 would have gone to you?</p> <p>9 A. Yes. That is accurate.</p> <p>10 Q. And I believe you also testified that you --</p> <p>11 and I'm thinking I'm quoting you here -- quote, fell out</p> <p>12 of qualification, unquote, in November of 2012. Is that</p> <p>13 right?</p> <p>14 A. Yes. I did not continue my qualification at</p> <p>15 that point.</p> <p>16 Q. And you didn't explain why it was that you</p> <p>17 didn't continue your qualification at that time. Could</p> <p>18 you tell me in general terms why it was that you chose</p> <p>19 not to continue your qualification at that time?</p> <p>20 A. As I said, it was personal.</p> <p>21 Q. Well, here is my problem, Ms. Sales. You</p> <p>22 filed a lawsuit against my client. And I assume you</p> <p>23 don't have any legal training; am I right?</p> <p>24 A. That's correct.</p> <p>25 Q. This is my opportunity to find out what it is</p>

<p style="text-align: right;">140</p> <p>1 you know that may be relevant to the lawsuit that you</p> <p>2 filed against my client.</p> <p>3 A. Okay.</p> <p>4 Q. Now, I do have some legal training. So what I</p> <p>5 think may be relevant to this lawsuit may differ from</p> <p>6 what you think may be relevant to the lawsuit. So based</p> <p>7 on that I'm going to need to know something a little bit</p> <p>8 more than its personal for me to make that</p> <p>9 determination.</p> <p>10 A. Okay.</p> <p>11 MR. JACOBSON: If I just might add my own with</p> <p>12 respect to that. We have stated and made clear that at</p> <p>13 this point there is no claim for lost economic damages</p> <p>14 or anything of that kind. I mean, to the extent that</p> <p>15 the question is aimed at that it isn't relevant.</p> <p>16 MR. WRIGHT: It is not aimed at that. I</p> <p>17 simply don't know why. There could be various reasons</p> <p>18 that it could be relevant and I can't make that</p> <p>19 determination unless she gives me just a little bit</p> <p>20 more.</p> <p>21 Q. (BY MR. WRIGHT) And I'll do this for you.</p> <p>22 If I make the determination right now that it is not</p> <p>23 reasonably relevant to this lawsuit then we'll stop that</p> <p>24 line of questioning immediately. Is that fair?</p> <p>25 A. That's fair.</p>	<p style="text-align: right;">142</p> <p>1 your medical providers about nail fungus?</p> <p>2 A. Not to my recollection. The very first nail</p> <p>3 fungus I ever had actually manifested in May of 2010.</p> <p>4 Q. Is it your opinion that you developed nail</p> <p>5 fungus in May of 2010?</p> <p>6 A. That is when I took off my nail polish from</p> <p>7 the manicure in April and there was fungus under both</p> <p>8 large toes; yes.</p> <p>9 Q. Have you had any tests performed to determine</p> <p>10 whether there was nail fungus on your toes?</p> <p>11 A. Tests from a medical facility?</p> <p>12 Q. Medical providers.</p> <p>13 A. Not at that time; no.</p> <p>14 Q. Have you since May of 2010 had any tests to</p> <p>15 determine whether there was nail fungus on your toes?</p> <p>16 A. I specifically did not. I don't know if in</p> <p>17 their biopsies, or their pursuit to find out what was</p> <p>18 going on, if that was done. But to my knowledge I have</p> <p>19 not specifically gone out and done that; no.</p> <p>20 Q. Is it fair to say then that no medical</p> <p>21 provider has confirmed the presence of nail fungus on</p> <p>22 your toes?</p> <p>23 A. Yes.</p> <p>24 MR. JACOBSON: Object to the form.</p> <p>25 Q. (BY MR. WRIGHT) You can answer.</p>
<p style="text-align: right;">141</p> <p>1 MR. JACOBSON: So, Tracy, you can generally</p> <p>2 explain to him what the personal reason is.</p> <p>3 THE WITNESS: Okay.</p> <p>4 MR. JACOBSON: And then he is going to make a</p> <p>5 determination as to whether or not he thinks he needs to</p> <p>6 ask any follow-up questions.</p> <p>7 THE WITNESS: Okay. My father and I have been</p> <p>8 estranged for eleven years and he lives right here in</p> <p>9 Boise. And we got back in contact in November. And he</p> <p>10 needs some major medical help pertaining to his health.</p> <p>11 So I was not in a position to where I could continue.</p> <p>12 Q. (BY MR. WRIGHT) I have just one follow-up</p> <p>13 question. And I think I know the answer to this. Has</p> <p>14 your father's return and his need for -- I believe you</p> <p>15 said major medical help -- created additional stress in</p> <p>16 your life?</p> <p>17 A. Somewhat, yes. More from the standpoint he</p> <p>18 has been gone out of my life, and then me losing my</p> <p>19 mother last May, based upon his health I don't have a</p> <p>20 whole lot of time with him.</p> <p>21 Q. I understand. I will move on. I have seen in</p> <p>22 your medical records a lot of -- well, I wouldn't</p> <p>23 characterize it as a lot. Several references to</p> <p>24 possible nail fungus.</p> <p>25 Do you recall having discussions with any of</p>	<p style="text-align: right;">143</p> <p>1 A. Mary Mayben, I believe is her name. And it</p> <p>2 was confirmed by two medical -- the PA's at St. Luke's</p> <p>3 in October and November of 2010 that they specifically</p> <p>4 said it was fungus.</p> <p>5 Q. Now, I have seen those medical records. And I</p> <p>6 didn't see that any tests were performed to confirm that</p> <p>7 that was nail fungus. And I think you just testified</p> <p>8 you are not aware of any tests being performed; am I</p> <p>9 right?</p> <p>10 A. To my knowledge, not at that capacity. But I</p> <p>11 have never known that you have had to take a test. You</p> <p>12 can see the nail where there is fungus. No disrespect.</p> <p>13 I don't know.</p> <p>14 Q. I'll represent to you that I have seen in your</p> <p>15 medical records that tests were performed to either</p> <p>16 confirm or rule out a diagnosis of nail fungus. And</p> <p>17 those tests came back negative. Do you not recollect</p> <p>18 any of that?</p> <p>19 A. I recollect somewhat of that nature after the</p> <p>20 nail -- I would need to see the date. I believe it</p> <p>21 was -- because of all of the doctors and the process of</p> <p>22 going through different doctors specifically for it at</p> <p>23 that time and everybody had a different opinion as to</p> <p>24 what was going on. And everybody was guessing. That</p> <p>25 was why the tests were done. But they were done</p>

<p style="text-align: right;">144</p> <p>1 actually on like tissue. Yeah, they took some tissue 2 and sent that in. I don't recall -- I believe they 3 actually did a small nail biopsy. There were several 4 different procedures done where they were sending it in 5 for testing. Or I shouldn't say several. There were a 6 few. 7 MR. WRIGHT: Could you read back my question? 8 (Record read.) 9 THE WITNESS: Yes, I do. I'm sorry. 10 Q. (BY MR. WRIGHT) So you do recall that those 11 tests came back negative? 12 A. I recall them telling me that. I never saw 13 the tests. 14 Q. Okay. What is your understanding personally 15 regarding the etiology of the problems you have been 16 having with your right big toe? 17 MR. JACOBSON: Do you know what "etiology" 18 means? 19 THE WITNESS: I am embarrassed to say I do 20 not. 21 MR. JACOBSON: Source or origin. 22 THE WITNESS: My understanding of where it 23 came from? Can you rephrase it one more time? 24 Q. (BY MR. WRIGHT) Sure. What is your 25 understanding of the source of the problems you have</p>	<p style="text-align: right;">146</p> <p>1 Q. To the best of your memory. 2 A. In 2011. Maybe the summer of 2011. Maybe 3 late spring. 4 Q. And can you recall the substance of that 5 conversation? 6 A. In regards to? 7 Q. Well, what did you tell him and what did he 8 tell you? 9 A. I was just asking questions as I was referred 10 by a friend who is vice president of, I believe, Sally's 11 Beauty Supply chain. One of the larger chains of beauty 12 supplies in southern California. 13 Q. What is that friend's name? 14 A. Pat Hills. 15 Q. Where did -- is that a man or woman? 16 A. Man. 17 Q. Where does Mr. Hills reside? 18 A. I believe in northern California still. 19 Q. Northern California is a pretty big place. 20 Where in northern California? 21 A. I do not know specifically. 22 Q. How long have you known Mr. Hills? 23 A. Oh, my goodness. Maybe approximately nine or 24 ten years. 25 Q. So do you have a phone number for Mr. Hills?</p>
<p style="text-align: right;">145</p> <p>1 been having with your right big toe? 2 A. Improper sterilization. Or lack of. 3 Q. And what do you base that understanding on? 4 A. Much research and contact with multiple people 5 in the beauty and nail industry. As well as a doctor 6 that has testified and done extensive research in 7 multiple cases that had been gone on in California with 8 nail salons. As well as certain people that have had 9 nail fungus as a result of pedicures and/or manicures. 10 Q. What doctor is that that you are referring to? 11 A. I do not know his name, but we have it on file 12 and we can get that to you. 13 MR. JACOBSON: I'll have to take a look and 14 see. I'm not sure. If we have something obviously 15 we've give it to you. 16 Q. (BY MR. WRIGHT) This isn't a doctor who has 17 examined you personally; is he? 18 A. No, he has not. 19 Q. Is this a doctor you have spoken to 20 personally? 21 A. By telephone; yes. 22 Q. You have spoken with him by telephone? 23 A. Yes, I have. 24 Q. When did you speak with him by telephone? 25 A. I don't recall the date.</p>	<p style="text-align: right;">147</p> <p>1 A. Not on me. But I do have one at home; yes. 2 Q. Could you provide that for us, please? 3 A. Okay. Yes. 4 Q. And speaking of which, previously in your 5 deposition you referred several times to certain records 6 that you have. Do you recall that? 7 A. Exactly what records? 8 Q. Your response to several questions was, "I'll 9 have to check my records on that." Do you recall those 10 answers? 11 A. I would have to know which questions. 12 Q. Well, let's put it this way. Do you have 13 records that you referred to in your -- previously in 14 your deposition someplace? 15 A. Yes, if you are talking about Nu Skin records. 16 As far as -- I believe you asked when I met Linda. 17 Along those lines, yes. 18 Q. Where are those records located? 19 A. At my home. 20 Q. How long would it take you to gather those 21 records and provide them to your attorney? 22 A. I can have it to him this next week. I have 23 them. I would just have to put them together. 24 Q. So you are telling me you can have those to 25 your attorney next week?</p>

<p style="text-align: right;">148</p> <p>1 A. I believe I can; yes.</p> <p>2 Q. I would like to get those. A week-and-a-half</p> <p>3 at the latest?</p> <p>4 A. What records specifically are you looking for?</p> <p>5 Q. Any records that you have referred to during</p> <p>6 your deposition.</p> <p>7 MR. JACOBSON: Counsel, I'll work on that with</p> <p>8 her. We'll get you what we have.</p> <p>9 Q. (BY MR. WRIGHT) You mentioned a dermatologist</p> <p>10 by the name of Randall Burr; am I correct?</p> <p>11 A. I may have been mistake. I believe it was</p> <p>12 Raymond Burr.</p> <p>13 Q. I think it is Randall Burr. If he is the one</p> <p>14 I am familiar with over in Meridian?</p> <p>15 A. Yes. Off of Overland.</p> <p>16 Q. Raymond Burr was -- he was Perry Mason.</p> <p>17 A. Oh. Sorry. Oh, well.</p> <p>18 MR. JACOBSON: We are in a lawsuit, Counsel.</p> <p>19 MR. WRIGHT: I understand how you can get</p> <p>20 confused.</p> <p>21 MR. JACOBSON: That's in the record; isn't it?</p> <p>22 Q. (BY MR. WRIGHT) And you treated with Dr. Burr</p> <p>23 prior to April 19, 2010; am I correct?</p> <p>24 A. I do believe that would be accurate.</p> <p>25 Q. What was the nature of your complaints that</p>	<p style="text-align: right;">150</p> <p>1 my memory serves me I'm pretty sure that he was the one.</p> <p>2 Q. And you said he prescribed this medication --</p> <p>3 we will call it that. We think it may be Clobetasol.</p> <p>4 But we'll just call it medication.</p> <p>5 A. It's a topical that you put on.</p> <p>6 Q. He prescribed them for flare-ups?</p> <p>7 A. It wasn't specific. The prescription was -- I</p> <p>8 believe it's a steroid. Initially there was something</p> <p>9 else prescribed, but it was like an ointment. And that</p> <p>10 caused -- it wasn't good. And it was greasy. The</p> <p>11 Clobetasol is clear and dries right away.</p> <p>12 Q. I'm sorry to harp on this. Was it prescribed</p> <p>13 to use when flare-ups occurred?</p> <p>14 A. Yes. If there was a flare-up; yes.</p> <p>15 Q. How often prior to April 19, 2010 did you</p> <p>16 experience psoriasis flare-ups?</p> <p>17 A. I do not remember.</p> <p>18 Q. More than a dozen a year?</p> <p>19 A. Honestly, I couldn't tell you to be exact.</p> <p>20 Q. Would that be -- well, is Clobetasol a</p> <p>21 prescription medication?</p> <p>22 A. Yes.</p> <p>23 Q. Where did you have your prescriptions for</p> <p>24 Clobetasol filled?</p> <p>25 A. Rite Aid is my pharmacist. I believe that was</p>
<p style="text-align: right;">149</p> <p>1 you sought out Dr. Burr's help prior to April 19, 2010?</p> <p>2 A. Not really complaints. They were just making</p> <p>3 sure that -- as I stated before I was born and raised in</p> <p>4 California. Just lots of sun exposure. Trying to be</p> <p>5 diligent about being proactive.</p> <p>6 Q. Did you see Dr. Burr prior to April 19, 2010</p> <p>7 with regard to any complaints of psoriasis?</p> <p>8 A. I don't recall complaining to him about that.</p> <p>9 Q. Which doctors have you seen with any psoriatic</p> <p>10 complaints? Or psoriasis complaints?</p> <p>11 A. You know, I do believe -- and it wasn't a</p> <p>12 complaint. It was a situation. I believe David</p> <p>13 Nielsen, because he was able to write me a prescription</p> <p>14 for basic flare-ups. And that was turned over to my</p> <p>15 current medical doctor, Terry Ribbens. I don't recall</p> <p>16 going to any other doctor complaining about that.</p> <p>17 Q. And just to be clear. You saw Dr. David</p> <p>18 Nielsen prior to April 19, 2010, regarding psoriasis?</p> <p>19 A. He was my general doctor. I didn't go</p> <p>20 specifically about that.</p> <p>21 Q. I understand. But --</p> <p>22 A. But we did have a conversation about it</p> <p>23 before; yes.</p> <p>24 Q. And is he the one who prescribed Clobetasol?</p> <p>25 A. I believe he was. I cannot be positive. As</p>	<p style="text-align: right;">151</p> <p>1 the only one. On Boise Avenue.</p> <p>2 Q. Rite Aid on Boise Avenue?</p> <p>3 A. Yes.</p> <p>4 Q. When you experienced a psoriasis flare-up how</p> <p>5 long would that last?</p> <p>6 A. Just a couple of days. Maybe three days, for</p> <p>7 the most part.</p> <p>8 Q. And were there any sort of precipitating</p> <p>9 factors leading to a flare-up?</p> <p>10 A. Mainly it is irritated by any antibiotics, is</p> <p>11 what I found. It is my belief -- I feel what causes it</p> <p>12 in my pursuit of finding out and talking and researching</p> <p>13 it. So I was able to control it. It can be stress</p> <p>14 triggered. But it was pretty easy to eliminate once I</p> <p>15 got to that point.</p> <p>16 Q. To which point?</p> <p>17 A. When I initially was diagnosed with psoriasis</p> <p>18 the final verdict was, as I stated, from a biopsy. That</p> <p>19 it was psoriasis and there was no cure for it. And I</p> <p>20 don't agree with that. Inasmuch as I never had it. And</p> <p>21 nobody in my family has had it. So it sent me down a</p> <p>22 different venue from medications to natural.</p> <p>23 Q. Do you still use Clobetasol to control</p> <p>24 psoriasis flare-ups?</p> <p>25 A. I haven't had to use it. I have it, but I</p>

<p style="text-align: right;">152</p> <p>1 haven't had to use it because I have not have any 2 flare-ups. 3 Q. In how long? 4 A. In several months. 5 Q. After April 19, 2010 did you experience any 6 psoriasis flare-ups? 7 A. Yes, I did. 8 Q. Do you recall how often you experienced these 9 flare-ups? 10 A. At that particular time there were times when 11 it was just continuous in a small degree. One or two 12 marks. Or at the hairline. Specifically, it was at the 13 hairline. 14 Q. You mentioned also one or two marks in other 15 areas of the body; am I right? 16 A. Yes. 17 Q. Where were those other marks? 18 A. Let me see. I had one I recall on the elbow. 19 I believe on the left elbow. And occasionally one or 20 two small -- they come up looking initially like a 21 chicken pox. So they are small. And I believe it was 22 on my left leg. And it was full-blown one time. I was 23 almost completely covered with them. 24 Q. At some point during your treatment for the 25 toe complaint -- can we call it a toe complaint?</p>	<p style="text-align: right;">154</p> <p>1 Q. Do you have an understanding of why the second 2 PICC line was inserted? 3 A. Yes. Because we found -- through Dr. Otto and 4 the Elks Wound Center we were able to do an MRI and it 5 showed osteomyelitis all through the right toe. 6 Q. Is it your understanding that you were 7 diagnosed with osteomyelitis? 8 A. Yes. 9 Q. And that was by Dr. Otto? 10 A. Dr. Otto via St. Luke's and the MRI; yes. 11 Q. Do you know what medications were administered 12 via that second PICC line? 13 A. Yes. It was Nafcillin. 14 Q. Which is another antibiotic; correct? 15 A. It was a massive antibiotic; yes. 16 Q. And how long were you -- we'll call it 17 taking -- Nafcillin? 18 A. I actually was on that for six weeks, 24 hours 19 a day, because they attach a pump to you. So it is 20 nonstop. 21 Q. And during that six weeks did the condition 22 with your toe improve? 23 A. You know, I can't say really that it did. To 24 be honest with you there was so many things as a result 25 of the medication that were causing other issues. And</p>
<p style="text-align: right;">153</p> <p>1 A. Sure. 2 Q. At some point during your treatment for the 3 toe complaint you were provided with a PICC line; is 4 that right? 5 A. That is correct. 6 Q. And that PICC line was to facilitate 7 intravenous administration of antibiotics; is that 8 right? 9 A. There was more than one PICC line. So, yes. 10 But, yes, they were to administer medication. 11 Q. I want to make sure I'm clear on this. After 12 April of 2010 you were given a PICC line on two separate 13 occasions? 14 A. Yes. There is actually a third one that had 15 to be put in. But, yes, there were two separate 16 situations. 17 Q. Do you know why the first one was taken out? 18 A. Yes. Dr. Mings -- excuse me. Dr. Coffman 19 from Infectious Disease believed that it was psoriasis 20 and not MRSA. 21 Q. Do you have an understanding of why he made 22 that determination? 23 A. Based upon the lab results on my blood and 24 what was coming back. I tested fine for what they were 25 searching for in MRSA.</p>	<p style="text-align: right;">155</p> <p>1 the toe was still painful. And, in my opinion, I do not 2 feel that it got any better; no. 3 Q. After the PICC line, the second PICC line was 4 removed, did you have any additional treatment for the 5 toe condition? 6 A. Yes. 7 Q. What treatment was that? 8 A. They surgically went in and cut my bone off 9 with wire cutters. 10 Q. And following that surgical procedure did the 11 toe condition improve? 12 A. That aspect of it did. 13 Q. What aspect is that? 14 A. I didn't have the pain and the throbbing 15 because there was no more bone. It had been cut away. 16 Q. And I take it from your answer that some part 17 of the condition did not improve; am I right? 18 A. That's correct. 19 Q. What part did not improve? 20 A. Well, my doctor, Dr. Chandler, had always 21 felt, as well as Dr. Otto, that we were dealing with two 22 different things. One being the fungus. And then the 23 osteomyelitis. So the osteomyelitis, to my knowledge, 24 at least I told myself, was better, because there was no 25 more bone there to house it.</p>

<p style="text-align: right;">156</p> <p>1 Q. Are you still having problems with your right 2 toe? 3 A. There are. Yes, as I stated before, it is the 4 new norm. I'm not too sure what to expect. There are 5 times where I have pain. I'm not sure if it is just 6 ghost nerve pain. 7 Q. Do you mind if I interrupt you? 8 A. Please. 9 Q. Before we get too far down the track. Is the 10 pain that you are experiencing right now in your toe 11 different or the same as the pain that you were 12 experiencing prior to the surgical procedure that 13 removed the bone in your toe? 14 A. At this point I'm not experiencing any pain 15 right now. 16 Q. When you do experience pain in your toe is it 17 different or the same? 18 A. There are some similarities. It is nowhere 19 near the extreme pain that I had gone through. 20 Q. Now, you were describing the continuing 21 problems with your toes. Please go ahead. 22 A. Well, as I stated, it is the new norm. I 23 don't want to run around being neurotic. Everybody has 24 a different opinion. And you just kind of have to go 25 with your gut. There is swelling. Redness. Although,</p>	<p style="text-align: right;">158</p> <p>1 real pretty. That's fine. 2 MR. JACOBSON: That's okay. 3 MR. WRIGHT: Let's go off the record. 4 (Recess.) 5 Q. (BY MR. WRIGHT) Do I recall correctly from 6 the previous portion of your deposition that you 7 testified you spoke with -- or you think you spoke with 8 Stacie Peabody on two, maybe three occasions; is that 9 right? 10 A. Yes. It was a very long time ago. 11 Q. Do you have any specific memory of the 12 conversations you had with Ms. Peabody? 13 A. You know, one time we talked about the Spa. 14 Basically it was just general, "Hi, how are you?" I 15 didn't know her that well. 16 Q. And by the Spa you mean the Nu Skin product 17 Spa? 18 A. Yes. Because she has one. 19 Q. Did you set her up to buy that Spa? 20 A. I helped her, yes. I put her in touch with 21 purchasing it; yes. 22 Q. And, once again, I just want to make sure I'm 23 clear on this so that I don't find out something later. 24 Can we say fairly that the details of those 25 conversations are something you just don't remember?</p>
<p style="text-align: right;">157</p> <p>1 it is a lot better. There is no nail bed anymore. It 2 is permanent disfiguration as far as that goes. But 3 when that gets better I can put an artificial nail on 4 it. It is just more from a standpoint of not knowing. 5 Not being sure if everything has been resolved. 6 Q. At some point during the last portion of your 7 deposition you, I believe, mentioned that you are 8 considering another surgical procedure on your toe. 9 Do I recall that correctly? 10 A. In part. Another procedure had been talked 11 about. And after I talked also with Dr. Ribbens he had 12 basically -- we don't know what -- it's speculation. 13 And it is guessing. There is no absolute as to what 14 they know is wrong. So I didn't want to really go on an 15 exploratory. 16 Q. So is it fair to say then that you have no 17 present intentions of undergoing another surgical 18 procedure on your toe? 19 A. That is correct. 20 Q. In order to evaluate your claim my client is 21 going to want to see the condition of your toe as it is 22 right now. I know this may be uncomfortable, but would 23 you mind if I took a photograph of the condition of your 24 foot as it is? 25 A. I have no problem. It is not going to look</p>	<p style="text-align: right;">159</p> <p>1 A. Yes. To be honest with you, it wasn't 2 anything that was -- it was just random conversation 3 talking to somebody. There was a point where she said 4 she didn't believe -- I don't remember if she said she 5 wasn't using it. Or she didn't -- I don't remember what 6 it was. There is a money back guarantee. And I had 7 told her there is a money back guarantee. That if you 8 are not happy you can get your money back. And she 9 said, "I want to return it." So I went and called Nu 10 Skin. But it had been past the time that -- 11 Q. The return period? 12 A. The return period. So I paid her \$200 out of 13 my pocket just because I had honored -- in order to 14 honor it. It wasn't the company's fault I didn't have 15 it right. But she still has the Spa. We never were 16 able to connect. 17 Q. Ms. Linda Cook, you testified that you met her 18 through soccer. Her son's soccer; right? 19 A. I believe that to be accurate. 20 Q. And at some point you developed a professional 21 relationship with Ms. Cook; is that fair? 22 A. Professional how? 23 Q. I guess in two regards. One, through Nu Skin. 24 Would that be fair? 25 A. I don't want to be stupid. What exactly are</p>

<p style="text-align: right;">160</p> <p>1 you asking?</p> <p>2 Q. Well, you recommended Nu Skin product line to</p> <p>3 Ms. Cook; is that right?</p> <p>4 A. I told her what I was using. She asked me.</p> <p>5 Q. And then you facilitated her in buying</p> <p>6 products from Nu Skin?</p> <p>7 A. I gave her a demonstration and she said, "I</p> <p>8 would love to have one of these."</p> <p>9 Q. And then you, we think, and maybe you'll have</p> <p>10 to check your records on this, and I'll let you do that,</p> <p>11 we think that you might have received a \$50 --</p> <p>12 A. Yes. And I say that because now -- and I</p> <p>13 don't know if it was then. But now you have an option</p> <p>14 of getting the \$50 bonus or applying the towards the</p> <p>15 person's volume themselves if that is what they want to</p> <p>16 do.</p> <p>17 Q. I mean, I guess I would call that sort of</p> <p>18 relationship a business relationship.</p> <p>19 A. We are friends. We were friends. And it</p> <p>20 would have just been that one. And she was able to</p> <p>21 purchase her own products at whatever time frame she</p> <p>22 wanted or whatever she wanted. I wouldn't really call</p> <p>23 it a business relationship. But that is just my</p> <p>24 opinion.</p> <p>25 Q. And the other one that I am referring to is</p>	<p style="text-align: right;">162</p> <p>1 get it. I apologize. That should have been produced.</p> <p>2 MR. WRIGHT: Fair enough.</p> <p>3 Q. (BY MR. WRIGHT) Did you receive a receipt?</p> <p>4 A. No.</p> <p>5 Q. Other than the check?</p> <p>6 A. No. Other than the check, no.</p> <p>7 Q. Do you recall any specific conversations with</p> <p>8 Ms. Cook regarding her relationship to Fingerprints Day</p> <p>9 Spa?</p> <p>10 A. I do not.</p> <p>11 Q. Do you recall any specific conversations with</p> <p>12 any other technician at Fingerprints Day Spa regarding</p> <p>13 their relationship with Fingerprints Day Spa?</p> <p>14 A. I guess I need to ask you exactly the context</p> <p>15 of that.</p> <p>16 Q. Really, any conversations whatsoever with any</p> <p>17 technician there about their relationship with the spa</p> <p>18 in general.</p> <p>19 A. No. Not with the spa in general.</p> <p>20 Q. How about with Ms. Peabody specifically?</p> <p>21 A. You know, I don't recall exactly. I have to</p> <p>22 be honest with you. I'm sure there were conversations.</p> <p>23 I know when I worked for Albertsons we talked about --</p> <p>24 you know, I'm not trying to be glib. I'm just trying to</p> <p>25 be honest.</p>
<p style="text-align: right;">161</p> <p>1 you went to Ms. Cook and had spa services performed by</p> <p>2 her.</p> <p>3 A. I have had three pedicures with her; yes.</p> <p>4 Q. Would you agree with me that that is a</p> <p>5 business relationship?</p> <p>6 A. I guess. Again, she's a friend. You know how</p> <p>7 you refer. You've got friends that do things. You</p> <p>8 honor them; yes.</p> <p>9 Q. But you did pay Ms. Cook for those services?</p> <p>10 A. Yes, I did.</p> <p>11 Q. And you testified that you paid Ms. Cook</p> <p>12 directly; is that right?</p> <p>13 A. I wrote her a check; yes.</p> <p>14 Q. Each time?</p> <p>15 A. I don't know. I could have given her cash.</p> <p>16 Q. But with regard to the April 19, 2010 pedicure</p> <p>17 you wrote a check to Ms. Cook?</p> <p>18 A. Yes, I did.</p> <p>19 Q. Do you have a copy of that check sometime?</p> <p>20 A. I have a carbon copy of the check.</p> <p>21 Q. Could you please provide that to your attorney</p> <p>22 and make sure we get a copy of that?</p> <p>23 MR. JACOBSON: Counsel, I apologize. I</p> <p>24 thought we produced that. If not, we'll make sure you</p> <p>25 get it. I do have that. And we will make sure that you</p>	<p style="text-align: right;">163</p> <p>1 Q. I appreciate that. If that is your answer</p> <p>2 that is a fair answer.</p> <p>3 A. Basically, no conversations.</p> <p>4 Q. Has any physician who has treated you</p> <p>5 personally rendered any opinion that your treatment at</p> <p>6 Fingerprints Day Spa is the source of the problems you</p> <p>7 have been having with your toe?</p> <p>8 A. I had one physician state that; yes.</p> <p>9 Q. Who would that physician be?</p> <p>10 A. That would be Dr. Chandler.</p> <p>11 Q. Would that be reflected in the medical</p> <p>12 records?</p> <p>13 A. I believe it was. But I cannot be absolute.</p> <p>14 I haven't sat down and gone through all of them.</p> <p>15 Q. Now, I want to be perfectly clear. I am</p> <p>16 asking not whether you had a conversation about your</p> <p>17 pedicure and the toe concurrently. I'm asking whether</p> <p>18 any physician has said, "I believe, and it is my</p> <p>19 opinion, that your toe, the condition of it right now,</p> <p>20 is a result of the pedicure you received at Fingerprints</p> <p>21 Day Spa"?</p> <p>22 A. That was not his exact verbiage. But, yes, he</p> <p>23 did state, as a matter of fact, that the condition</p> <p>24 couldn't be caused by anything but that.</p> <p>25 MR. WRIGHT: I think that is everything I</p>

<p style="text-align: right;">164</p> <p>1 have.</p> <p>2 MR. JACOBSON: Tracy, I just have a couple of</p> <p>3 questions for you.</p> <p>4</p> <p>5 EXAMINATION</p> <p>6 QUESTIONS BY MR. JACOBSON:</p> <p>7 Q. In terms of the date of the incident do you</p> <p>8 recall when your appointment was that day at</p> <p>9 Fingerprints?</p> <p>10 A. I believe it was like mid to late morning.</p> <p>11 10:00, 11:00, maybe. To the best of my recollection, it</p> <p>12 was before noon. I want to say that would have been my</p> <p>13 normal time frame. I cannot be absolute. But to the</p> <p>14 best of my recollection I want to say 10:00. Maybe</p> <p>15 11:00.</p> <p>16 Q. What time did you arrive at Fingerprints for</p> <p>17 your appointment?</p> <p>18 A. I usually tried to be at least five minutes</p> <p>19 early. I don't have an exact time.</p> <p>20 Q. Were you about five minutes early that</p> <p>21 morning?</p> <p>22 A. I would like to believe so.</p> <p>23 Q. When you arrived at Fingerprints Day Spa on</p> <p>24 the day of the incident do you recall what Ms. Cook was</p> <p>25 doing?</p>	<p style="text-align: right;">166</p> <p>1 A. Usually -- my recollection is that the tools</p> <p>2 sit in like a glass or something with some type of -- if</p> <p>3 I remember correctly it was like a blue color. A glass</p> <p>4 or something of that nature where you just put --</p> <p>5 Q. So the tools were in there. Do you know what</p> <p>6 the liquid was?</p> <p>7 A. No.</p> <p>8 Q. What about the basin your feet were in? Did</p> <p>9 you see her disinfect the basin?</p> <p>10 A. No, I didn't.</p> <p>11 Q. Did you smell any disinfectant in the air?</p> <p>12 A. No, I did not.</p> <p>13 Q. Did you see any disinfectant around in the</p> <p>14 spa?</p> <p>15 A. No, I did not.</p> <p>16 Q. Tracy, I'm handing you what has been marked</p> <p>17 for identification as Deposition Exhibit No. 5. This is</p> <p>18 the letter from Dr. Wyatt to Dr. Ader that you were</p> <p>19 asked about previously in your deposition. I believe</p> <p>20 you indicated when you were asked about this letter that</p> <p>21 you had not seen this specific letter before. Is that</p> <p>22 right?</p> <p>23 A. That's correct.</p> <p>24 Q. Did you have any conversations with Dr. Ader</p> <p>25 regarding your visit to Dr. Wyatt after that visit</p>
<p style="text-align: right;">165</p> <p>1 A. I believe she said, "Hi, Tracy, I'll be with</p> <p>2 you in a minute." And went over to her station where</p> <p>3 she does nails. And whether or not she was cleaning up</p> <p>4 her desk, her work station, or writing in her</p> <p>5 appointment book, I don't remember. I just remember she</p> <p>6 was over there. I don't even remember if she had a</p> <p>7 client that was just leaving at that time. I just</p> <p>8 remember I sat there in the little waiting area real</p> <p>9 briefly. It wasn't long.</p> <p>10 Q. You had said you weren't sure whether there</p> <p>11 was a client there or not. Do you have any recollection</p> <p>12 as to whether you were the first client Ms. Cook</p> <p>13 serviced that morning or not?</p> <p>14 A. I have no idea if I was or was not.</p> <p>15 Q. Do you recall what you saw Ms. Cook doing</p> <p>16 prior to her giving you the pedicure on the date of the</p> <p>17 incident?</p> <p>18 A. As far as? There is two different areas. As</p> <p>19 far as what she was doing? Again, I want to be</p> <p>20 absolute. Like I said, there is the area -- there is</p> <p>21 the hair portion, the nail portion, the waiting room,</p> <p>22 and you go downstairs for the pedicures. I believe --</p> <p>23 Q. Did you see Ms. Cook disinfect any equipment</p> <p>24 that she used during the course of the pedicure prior to</p> <p>25 her beginning to administer the pedicure to you?</p>	<p style="text-align: right;">167</p> <p>1 occurred?</p> <p>2 A. After this visit?</p> <p>3 Q. Yes.</p> <p>4 A. Did I talk to Dr. Ader about Casi Wyatt after</p> <p>5 this visit?</p> <p>6 Q. Yes.</p> <p>7 A. I have only talked to Dr. Ader once when I</p> <p>8 went in and had him evaluate.</p> <p>9 Q. Did Dr. Ader ever make any comments or express</p> <p>10 any opinion to you about what Dr. Wyatt said in relation</p> <p>11 of her examination of you?</p> <p>12 A. He felt that it was inaccurate and was</p> <p>13 confused as to why she was pursuing psoriatic arthritis.</p> <p>14 That it was obvious to him that I did not have any</p> <p>15 arthritis. Let alone psoriatic arthritis. That it is</p> <p>16 not specific of one joint. And then he had me -- I</p> <p>17 showed him how limber I was. He checked my other joints</p> <p>18 and there was no indication whatsoever of any stiffness,</p> <p>19 swelling or inability to do anything. And that I could</p> <p>20 even still do the splits. He wasn't sure why she was</p> <p>21 going down that avenue.</p> <p>22 MR. JACOBSON: I don't have any other</p> <p>23 questions at this time.</p> <p>24 MR. WRIGHT: I have one follow-up.</p> <p>25 ///</p>

<p style="text-align: right; margin: 0;">168</p> <p>1 FURTHER EXAMINATION</p> <p>2 QUESTIONS BY MR. WRIGHT:</p> <p>3 Q. Wouldn't it be fair to say that you don't know</p> <p>4 one way or the other whether Ms. Cook sterilized her</p> <p>5 utensils or the foot basin prior to the 4-19-10</p> <p>6 pedicure?</p> <p>7 A. That is correct.</p> <p>8 MR. JACOBSON: Object to the form.</p> <p>9 Q. (BY MR. WRIGHT) You can answer.</p> <p>10 A. I did not see. I have no idea of knowing</p> <p>11 whether she did or not. That is correct.</p> <p>12 MR. WRIGHT: Thank you.</p> <p>13 (Deposition concluded at 2:28 p.m.)</p> <p>14 (Signature requested.)</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right; margin: 0;">170</p> <p>1 ERRATA SHEET FOR TRACY SALES</p> <p>2 Page ____ Line ____ Reason for Change ____</p> <p>3 Reads ____</p> <p>4 Should Read ____</p> <p>5</p> <p>6 Page ____ Line ____ Reason for Change ____</p> <p>7 Reads ____</p> <p>8 Should Read ____</p> <p>9</p> <p>10 Page ____ Line ____ Reason for Change ____</p> <p>11 Reads ____</p> <p>12 Should Read ____</p> <p>13</p> <p>14 Page ____ Line ____ Reason for Change ____</p> <p>15 Reads ____</p> <p>16 Should Read ____</p> <p>17</p> <p>18 Page ____ Line ____ Reason for Change ____</p> <p>19 Reads ____</p> <p>20 Should Read ____</p> <p>21</p> <p>22 Page ____ Line ____ Reason for Change ____</p> <p>23 Reads ____</p> <p>24 Should Read ____</p> <p>25 You may use another sheet if you need more room.</p> <p> WITNESS SIGNATURE _____</p>
<p style="text-align: right; margin: 0;">169</p> <p>1 CERTIFICATE OF WITNESS</p> <p>2 I, TRACY SALES, being first duly sworn, depose</p> <p>3 and say:</p> <p>4 That I am the witness named in the foregoing</p> <p>5 deposition, Volume II, consisting of pages 132 through</p> <p>6 168; that I have read said deposition and know the</p> <p>7 contents thereof; that the questions contained therein</p> <p>8 were propounded to me; and that the answers contained</p> <p>9 therein are true and correct, except for any changes</p> <p>10 that I may have listed on the Change Sheet attached</p> <p>11 hereto:</p> <p>12 DATED this ____ day of _____, 2013.</p> <p>13</p> <p>14 _____</p> <p>15 TRACY SALES</p> <p>16</p> <p>17 SUBSCRIBED AND SWORN to before me this ____ day</p> <p>18 of _____, 2013.</p> <p>19</p> <p>20 _____</p> <p>21 NAME OF NOTARY PUBLIC</p> <p>22 _____</p> <p>23 NOTARY PUBLIC FOR _____</p> <p>24 RESIDING AT _____</p> <p>25 MY COMMISSION EXPIRES _____</p>	<p style="text-align: right; margin: 0;">171</p> <p>1 REPORTER'S CERTIFICATE</p> <p>2 I, MONICA M. ARCHULETA, CSR No. 471, Certified</p> <p>3 Shorthand Reporter, certify:</p> <p>4 That the foregoing proceedings were taken</p> <p>5 before me at the time and place therein set forth, at</p> <p>6 which time the witness was put under oath by me;</p> <p>7 That the testimony and all objections made were</p> <p>8 recorded stenographically by me and transcribed by me or</p> <p>9 under my direction;</p> <p>10 That the foregoing is a true and correct record</p> <p>11 of all testimony given, to the best of my ability;</p> <p>12 I further certify that I am not a relative or</p> <p>13 employee of any attorney or party, nor am I financially</p> <p>14 interested in the action.</p> <p>15 IN WITNESS WHEREOF, I set my hand and seal this</p> <p>16 5th day of February, 2013.</p> <p>17</p> <p>18</p> <p>19</p> <p>20 _____</p> <p>21 MONICA M. ARCHULETA, CSR</p> <p>22 Notary Public</p> <p>23 P.O. Box 2636</p> <p>24 Boise, Idaho 83701-2636</p> <p>25 My commission expires August 3, 2018</p>

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surfaces in 10 minutes at 20° C. A 1:32 dilution is effective against M tuberculosis on hard, inanimate surfaces in 10 minutes at 20° C. Remove heavy soil or gross filth and thoroughly clean surfaces.
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Do not contaminate water, food or feed by storage or disposal.
Pesticide Storage: Store only in original container away from heat or open flame. Keep container closed when not in use. Keep out of reach of children.
Pesticide Disposal: This germicide, its solutions or rinsing from empty containers should be disposed of in a toilet or service sink served by a sanitary sewer or in a landfill approved for pesticides.
Container Disposal: Triple rinse and deposit in a waste container for incineration or burial in a landfill approved for pesticide containers.
KILLS HIV (AIDS VIRUS) ON PRECLEANED ENVIRONMENTAL SURFACES/ OBJECTS PREVIOUSLY SOILED WITH BLOOD/BODY FLUIDS in health care settings or other settings in which there is an expected likelihood of soiling of

inanimate surfaces/objects with blood or body fluids, and in which the surfaces/objects likely to be soiled with blood or body fluids can be associated with the potential for transmission of human immunodeficiency virus Type 1 (HIV-1) (associated with AIDS).

SPECIAL INSTRUCTIONS FOR CLEANING AND DECONTAMINATION AGAINST HIV (AIDS VIRUS)

OF SURFACES/OBJECTS SOILED WITH BLOOD AND BODY FLUIDS

Personal Protection: Disposable latex or vinyl gloves, gowns, masks and/or eye coverings as appropriate must be worn during all cleaning and decontamination procedures of blood and other body fluids.

Cleaning Procedures: Blood and other body fluids must be thoroughly cleaned from surfaces and objects before applying disinfectant.

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4-8oz bk rev 8/04

Manufactured by: RBR Productions Inc./Isabel Cristina
P.O. BOX 3599, Teaneck, NJ 07666
Tel: (800) 247-4130 (outside NJ) • (201) 498-1044 (in NJ)

WARNING - First Aid

If in eyes: Hold eye open and rinse slowly and gently with water for 15-20 minutes. Remove contact lenses, if present, after the first 5 minutes, then continue rinsing. Call a poison control center or doctor for treatment advice.

If on skin or clothing: Take off contaminated clothing. Rinse skin immediately with plenty of water for 15-20 minutes. Call a poison control center or doctor for treatment advice.

If swallowed: Call a poison control center immediately for treatment advice. Have person sip a glass of water if able to swallow. Do not induce vomiting unless told to do so by the poison control center or doctor. Do not give anything by mouth to an unconscious person.

POISON CONTROL HOTLINE 800-222-1222 for emergency medical treatment info. Have product label available

PEEL OFF THIS PANEL FOR ADDITIONAL INFORMATION AND PRECAUTIONARY STATEMENTS

LET'S TOUCH®

LET'S TOUCH® is a hospital and tuberculocidal disinfectant concentrate especially formulated for the beauty care profession. It provides broad spectrum protection: bactericidal, fungicidal, virucidal, staphylocidal, pseudomonacidal, tuberculocidal, and prevents cross contamination from all

metal salon instruments when used as directed. Use it to disinfect all pre-cleaned metal salon instruments including manicurist nippers and cuticle pushers, shears and metal skin care instruments. Let's Touch® does not rust or dull quality metal instruments, is pH buffered, and is biodegradable.

DIRECTIONS FOR USE

It is a violation of Federal Law to use this product in a manner inconsistent with its labeling. Before immersion in Let's Touch®, all instruments and devices must be thoroughly cleaned to remove excess dirt, rinsed and rough dried. The removal of heavy soils and the cleaning of all surfaces prior to application of this product is required. When using Let's Touch® for the first time, thoroughly clean and rinse trays and containers in order to remove any residues. Mixing Let's Touch® in a container which had another disinfectant in it can cause a brown gel-like substance to form. If this happens, thoroughly clean and rinse all contaminated instruments, trays or containers and remix Let's Touch®.

Use one part Let's Touch® to 32 parts water for disinfection of pre-cleaned metal instruments and equipment. Let's Touch® is distributed in concentrated form in Twin-Neck containers and in 1 oz. bottles.

DIRECTIONS FOR MIXING WITH BOTTLES AND TWIN-NECK CONTAINER

Water	1 Pint (16 oz.)	1 Quart (32 oz.)	1/2 Gallon (64 oz.)	1 Gallon (128 oz.)
Let's Touch®	1/2 fl. oz.	1 fl. oz. or 1 bottle	2 fl. oz. or 2 bottles	4 fl. oz. or 4 bottles

Always add 1 bottle or 1 oz. of Let's Touch® to every 32 fl. oz. of water. When using the Twin-Neck container, squeeze the bottle until the easy-measure reservoir is filled to the desired amount.

DIRECTIONS FOR MIXING WITH THE MANICURIST AND HAIR STYLIST SYSTEMS

Manicurist System

1. Fill the tall plastic mixing jar to the 32 oz. Fill Line with water.
2. Add 1 oz. of Let's Touch® (1 Bottle). Cap & mix by turning upside down a few times.
3. Pour the mixed solution into the glass manicurist jar to the suggested use level line.
4. Store the remaining solution until needed.

Hairstylist System

1. Remove the plunger mechanism.
2. Fill the glass jar to the 32 oz. Fill Line with water.
3. Add 1 oz. of Let's Touch® (1 Bottle).

Mix solution by replacing plunger and moving it up and down.

Always leave instruments in Let's Touch® solution at all times and overnight for storage. Replace solution daily, or earlier if cloudy or dirty.

FOR INSTRUMENT DISINFECTION: After cleaning instruments, place articles in Let's Touch® solution for ten minutes.

NOTE: Articles must be fully submerged in solution at all times.

FOR METAL INSTRUMENT STORAGE: A solution of one part Let's Touch® to

32 parts water (see above for mixing instructions) does not rust or dull, and does not stain or otherwise attack metal instruments such as quality salon shears, manicurist and skin care implants. The solution may be used for prolonged (overnight) storage of all but non-metal instruments, plastic or rubber items.

LET'S TOUCH® IS A COMPLETE PRODUCT. DO NOT MIX WITH OTHER CHEMICALS. Use only as directed. If frozen, thaw and remix before use.

Let's Touch® is recommended for use in salons, hospitals, dental offices or other facilities requiring disinfection of metal instruments.

FOR HOSPITAL AND DENTAL OFFICE USE: Let's Touch® is a concentrated disinfectant to be used at a 1:32 dilution with water for cold decontamination/disinfection of pre-cleaned equipment. For disinfection immerse instruments for 10 minutes.

This product is not to be used as a terminal sterilant/high level disinfectant on any surface or instrument that (1) is introduced with the bloodstream or normal sterile areas of the body, or (2) contacts intact mucous membranes but which does not ordinarily penetrate the blood barrier or otherwise enter normally sterile areas of the body. This product may be used to pre-clean or decontaminate critical or semi-critical medical devices prior to sterilization or high level disinfection.

The 1:32 dilution kills pathogenic bacteria and fungi such as *S. Aureus*, *S. choleraesuis*, *Ps. aeruginosa*, *M. tuberculosis* (effective in 10 minutes at 20° C), and *C. albicans*. Let's Touch® is virucidal against Influenza A2 (Hong Kong), Herpes Simplex 1 and 2, Adenovirus Type 2 and Vaccina on hard inanimate

EXHIBIT E

000212



STATE OF IDAHO

BUREAU OF OCCUPATIONAL LICENSES

700 W. State St.
Boise, Idaho 83702
(208) 334-3233
FAX (208) 334-3945
E-Mail ibol@ibol.idaho.gov
Website www.ibol.idaho.gov

May 3, 2013

To be picked up

James F. Jacobson
JACOBSON & JACOBSON, PLLC
660 e. Franklin Road, Suite 110
Meridian, Idaho 83642

Re: Subpoena Duces Tecum dated April 11, 2013 in the case of *Tracy Sales, individually v. Stacie Peabody, individually and doing business under the assumed name of Fingerprints Day Spa; and Linda Cook, Individually.*

Dear Mr. Jacobson:

Accompanying, in response to the above referenced subpoena duces tecum issued to the Records Custodian, Idaho Bureau of Occupational Licenses (IBOL), are the following:

Copies of one-hundred twenty-six (126) pages of documents, which constitute IBOL's licensure, inspection and discipline files. These are the records maintained in IBOL's files that are responsive to the command for production or inspection set forth in the subpoena duces tecum.

You will note that this office has redacted certain confidential information such as a social security number, federal tax identification number and bank checking account number. Such confidential information may be protected from disclosure by applicable federal and state laws and court rules, and if needed for your case should be obtained directly from the defendants. Unless I hear from you to the contrary I will assume this response satisfies the command of the subpoena and that no further action is required of IBOL officials as a response.

Sincerely,

A handwritten signature in black ink, appearing to read "Maurice O. Ellsworth".

Maurice O. Ellsworth
Legal Counsel

Enclosure: Documents as indicated

000213

**INSPECTIONS OF FINGER PRINTS, CS-6091
2007 - PRESENT**

STATE OF IDAHO
DEPARTMENT OF SELF-GOVERNING AGENCIES
BUREAU OF OCCUPATIONAL LICENSES
IDAHO BOARD OF COSMETOLOGY

CS-6091

Inspection No. 20070724

CS-6091	3/11/1998	Inspection Date:	7/18/2007	Shop Phone No:	208 384-9908
FINGER PRINTS		Final Score:	100	Investigator:	Kevin Malveaux
STACIE PEABODY		Comments:			
1414 BROADWAY					
BOISE, ID, 83706		Notes:	lgoff - 09/01/2011: OOB STACIE PEABODY Confirmed by NEW NEW SALON IN HOME		

Item	Item	Detail Notes	Weight	Points Off
1	Premises			
	a. Shall be open to inspection during business hours to agents of the Board.			
	b. Shall be separated from living areas by substantial walls and/or closable doors.			
	c. Shall be maintained in an orderly manner.			
	d. Shall be heated, lighted, & ventilated so as to be safe & comfortable to the operators & patrons.			
2	Floors, Walls and Ceilings			
	a. Floors shall be kept clean and in good repair at all times.			
	b. Walls shall be kept clean and in good repair at all times.			
	c. Ceilings shall be kept clean and in good repair at all times. furniture, and all other fixtures			
	d. Furniture shall be kept clean and in good repair at all times.			
	e. All other fixtures shall be kept clean and in good repair at all times.			
3	Instrument Cleaning			
	a. All instruments used shall be thoroughly cleaned prior to storage.			
4	Instrument Sanitizing			
	a. All instruments shall be sanitized after cleaning & prior to use, with an EPA sanitizing agent.			
	b. Every precaution shall be taken to prevent the transfer of disease-causing pathogens.			
5	Towels			
	a. Clean towels shall be used for each patron.			
	b. A clean paper or cloth neckband shall provide a sanitary barrier between a patron's neck & cape.			
	c. Paper towels & paper neckstrips shall be disposed of after one (1) use.			
6	Storage of Equipment			
	a. All instruments shall be stored in clean & closed containment after sanitizing.			
	b. All towels shall be stored in clean & closed containment after sanitizing.			
	c. All linens shall be stored in clean & closed containment after sanitizing.			
7	Dispensers			
	a. All solutions & compounds shall be maintained & dispensed in a sanitary manner.			
	b. All single-use applicators shall be disposed of after one (1) use.			
	c. All bulk & multi-use solutions & compounds shall be maintained free of foreign contaminants.			

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STATE OF IDAHO
DEPARTMENT OF SELF-GOVERNING AGENCIES
BUREAU OF OCCUPATIONAL LICENSES
IDAHO BOARD OF COSMETOLOGY

CS-6091

Inspection No. 20070724

CS-6091	3/11/1998
FINGER PRINTS	
STACIE PEABODY	
1414 BROADWAY	
BOISE, ID, 83706	

Inspection Date:	7/18/2007	Shop Phone No:	208 384-9908
Final Score:	100	Investigator:	Kevin Malveaux
Comments:			
Notes:	Ilgoff - 09/01/2011: OOB STACIE PEABODY Confirmed by NEW NEW SALON IN HOME		

Item	Item	Detail Notes	Weight	Points Off
8	Uniforms			
	a. All clothing worn by operators shall be clean			
	b. All clothing worn by operators shall be washable			
9	Water Supply			
	a. Water supplies shall be from an approved source.			
	b. Sufficient basins available			
	c. Hot and cold running water, & approved drainage systems			
	d. Soap shall be conveniently located within the work area			
	e. Single-use towels shall be conveniently located within the work area			
	f. Every operator and/or student shall wash their hands prior to providing service to any patron.			
10	Toilet Facilities			
	a. No adequate or convenient toilet facilities			
	b. No hot and cold running water, basin or approved disposal system			
	c. No soap			
	d. No single use towels			
	e. Failure to maintain clean or sanitary condition			
11	Safety			
	a. A clearly identifiable first-aid kit must be readily accessible on the premises.			
	b. No animals are allowed in shops or schools.			
12	Certificates			
	a. A current establishment license shall be conspicuously displayed in the work area.			
	b. Establishments must be under the direct supervision of a licensed operator.			
	c. Valid operator license(s) shall be conspicuously displayed in the work area.			
	d. A copy of the sanitary rules shall be conspicuously displayed in the work area.			
	e. A valid classification card shall be conspicuously displayed in the work area.			
13	Licenses			
	a. No establishment license			

STATE OF IDAHO
DEPARTMENT OF SELF-GOVERNING AGENCIES
BUREAU OF OCCUPATIONAL LICENSES
IDAHO BOARD OF COSMETOLOGY

CS-6091

Inspection No. 20070724

CS-6091	3/11/1998	Inspection Date:	7/18/2007	Shop Phone No:	208 384-9908
FINGER PRINTS		Final Score:	100	Investigator:	Kevin Malveaux
STACIE PEABODY		Comments:			
1414 BROADWAY					
BOISE, ID. 83706		Notes:	Iloff - 09/01/2011: OOB STACIE PEABODY Confirmed by NEW NEW SALON IN HOME		

Item	Item	Detail Notes	Weight	Points Off
b.	No personal operator's license			
c.	Not conspicuously displayed			
Totals for Inspection ----->			100	0

Grading - 'A' for a score of 90 through 100; 'B' for a score of 80 through 89; and 'C' for a score of 79 or below. The 'C' classification denotes unacceptable conditions. Required improvements must be demonstrated within thirty (30) days for continued operation. These inspection requirements are in accord with the laws of the State of Idaho and the rules of the IDAHO BOARD OF COSMETOLOGY.

Remarks: NT-244 1/1/08, NT-234462 1/21/08, NT-745 10/14/07, EST-233984 9/14/08

STATE OF IDAHO
DEPARTMENT OF SELF-GOVERNING AGENCIES
BUREAU OF OCCUPATIONAL LICENSES
IDAHO BOARD OF COSMETOLOGY

CS-6091

Inspection No. 20091223

CS-6091	3/11/1998
FINGER PRINTS	
STACIE PEABODY	
1414 BROADWAY	
BOISE, ID, 83706	

Inspection Date:	12/23/2009	Shop Phone No:	208 384-9908
Final Score:	95	Investigator:	Warren Schiffer
Comments:	111 121 41		
Notes:	lgoff - 09/01/2011: OOB STACIE PEABODY Confirmed by NEW NEW SALON IN HOME		

Item	Item	Detail Notes	Weight	Points Off
1	Premises			
	1. All shops and schools shall be open to inspection during business hours to authorized agents of the			
2	Floors, Walls and Ceilings			
	1. Floors, walls, ceilings, furniture, and all other fixtures shall be kept clean and in good repair at			
3	Instrument Cleaning			
	1. All instruments used by operators shall be thoroughly cleaned after each use and prior to storage an			
4	Instrument Sanitizing			
	1. All instruments used by operators shall be sanitized after cleaning and prior to use on each patron,	needs hospital grade sanitizer for files and brushes		2
5	Towels			
	1. Clean towels shall be used for each patron. A clean paper or cloth neckband shall be used to provide			
6	Storage of Equipment			
	1. All instruments, towels, and linens shall be stored in clean, closed cabinets, drawers, and/or conta			
7	Dispensers			
	1. All solutions and/or compounds shall be clearly labeled, maintained, and dispensed in a sanitary man			
8	Uniforms			
	1. All clothing worn by operators shall be clean and washable.			
9	Water Supply			
	1. Water supplies shall be from an approved source. Sufficient basins with hot and cold running water,			
10	Toilet Facilities			
	1. Clean, adequate and convenient toilet facilities, located and accessible from within the building wh			
11	Safety			
	1. Each shop and school shall have a clearly identifiable first-aid kit readily accessible on the premi	Band aids		1

Run Time: 4/19/2013 12:44:00 PM

STATE OF IDAHO
DEPARTMENT OF SELF-GOVERNING AGENCIES
BUREAU OF OCCUPATIONAL LICENSES
IDAHO BOARD OF COSMETOLOGY

CS-6091

Inspection No. 20091223

CS-6091	3/11/1998	Inspection Date:	12/23/2009	Shop Phone No:	208 384-9908
FINGER PRINTS		Final Score:	95	Investigator:	Warren Schiffer
STACIE PEABODY		Comments:	111 121 41		
1414 BROADWAY		Notes:	lgolf - 09/01/2011: OOB STACIE PEABODY Confirmed by NEW NEW SALON IN HOME		
BOISE, ID, 83706					

Item	Item	Detail Notes	Weight	Points Off
12	Licenses and Certificates			
	1. All shops and schools must be licensed prior to their operation and must be under the direct supervi	Not conspicuous		2
Totals for Inspection ----->			100	5

Grading - 'A' for a score of 90 through 100; 'B' for a score of 80 through 89; and 'C' for a score of 79 or below. The 'C' classification denotes unacceptable conditions. Required improvements must be demonstrated within thirty (30) days for continued operation. These inspection requirements are in accord with the laws of the State of Idaho and the rules of the IDAHO BOARD OF COSMETOLOGY.

Remarks:

CS-6091

IDAHO BUREAU OF OCCUPATIONAL LICENSES BARBER AND BEAUTY SHOP AND SCHOOL INSPECTION FORM

IDAPA 24.04.01.800 AND 24.02.01.550

WEIGHT POINTS OFF

01. Premises. All shops and schools shall be open to inspection during business hours to authorized agents of the Cosmetology/Barber Boards. Shops and schools must be separated from living areas by substantial walls and/or closable doors. All shops and schools must be maintained in an orderly manner and shall be heated, lighted, and ventilated so as to be safe and comfortable to the operators and patrons.....	5	
02. Floors, Walls, and Ceilings. Floors, walls, ceilings, furniture, and all other fixtures shall be kept clean and in good repair at all times	5	
03. Instrument Cleaning. All instruments used by operators shall be thoroughly cleaned after each use and prior to storage and/or sanitation.....	15	
04. Instrument Sanitation. All instruments used by operators shall be sanitized after cleaning and prior to use on each patron, with a sanitizing agent registered by the Environmental Protection Agency as Hospital Grade or better. Every precaution shall be taken to prevent the transfer of disease-causing pathogens from person to person	15	1
05. Towels. Clean towels shall be used for each patron. A clean paper or cloth neckband shall be used to provide a sanitary barrier which shall be maintained between each patron's neck and all multi-use capes. Paper towels and paper neck-strip shall be disposed of after one (1) use	5	
06. Storage of Equipment. All instruments, towels, and linens shall be stored in clean, closed cabinets, drawers, and/or containers after they are cleaned and sanitized	5	1
07. Dispensers. All solutions and/or compounds shall be clearly labeled, maintained, and dispensed in a sanitary manner. All single-use applicators shall be disposed of after one (1) use. Paraffin, waxes and all other solutions and/or compounds shall be maintained free of any foreign contaminants.....	5	1
08. Uniforms. All clothing worn by operators shall be clean and washable	5	
09. Water Supply. Water supplies shall be from an approved source. Sufficient basins with hot and cold running water, approved drainage systems, soap and single-use towels shall be conveniently located within the work area. Every operator and/or student shall wash their hands prior to providing service to any patron	10	
10. Toilet Facilities. Clean, adequate and convenient toilet facilities, located and accessible from within the building where the shop or school is located, shall be available for use by operators and patrons. A basin with hot and cold running water, approved drainage systems, soap and single-use towels shall be provided within said facilities.....	10	
11. Safety. Each shop and school shall have a clearly identifiable first-aid kit readily accessible on the premises. No animals are allowed in shops or schools except those animals trained to provide service to the physically impaired	5	
12. Licenses and Certificates. All shops and schools must be licensed prior to their operation and must be under the direct supervision of a licensed operator. A current shop and/or school license, valid operator license(s) or permit(s), a copy of these rules, and a valid classification card shall be conspicuously displayed in the work area of each shop and/or school for the information of operators, Board agents, and the public in general	15	4
GRAND TOTAL.....	100	7

NOTES:

- #12 CS-6091 Facility License EXPIRED 03-11-11/NOT DISPLAYED
- #12 Rules/LAWS NOT DISPLAYED
- #4 BARBASOL needs changed
- #6 Hair on Drawer #7 Cotton Disp. uncovered

Classification of Shops and Schools. Following an inspection, each shop and school will receive a classification as follows: 100% - 90% = "A," 89% - 80% = "B," 79% and below = "C." The "C" classification denotes an unacceptable rating and improvements are required within thirty (30) days for continued operation.

Investigator:

Facility Representative:

Inspection Date:

COPY TO BE RETAINED BY LICENSEE

Mooty
Cindy
7-3-13
DS

JAMES F. JACOBSON, ISB #7011
ROBERT W. JACOBSON, ISB # 7156
JACOBSON & JACOBSON, PLLC
660 E. Franklin Road, Suite 110
Meridian, ID 83642
Telephone: (208) 884-1995
Facsimile: (208) 477-5210
Email: james@jjlawidaho.com
Email: bob@jjlawidaho.com

Attorneys for Plaintiff

NO. _____
A.M. _____ P.M. 9:20

JUL 02 2013

CHRISTOPHER D. RICH, Clerk
By CHELSIE PINKSTON
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL

DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRACY SALES, individually;

Plaintiff,

vs.

STACIE PEABODY, individually and doing
business under the assumed name of
FINGERPRINTS DAY SPA; and LINDA
COOK, individually;

Defendants.

Case No. CV PI 1206516


PLAINTIFF'S MOTION TO STRIKE

COMES NOW the above-named Plaintiff, Tracy Sales, by and through her counsel of record, Jacobson & Jacobson, PLLC, and hereby moves this Court to strike Exhibit B to the Affidavit of Tract L. Wright in support of Defendants' Stacie Peabody and Fingerprints Day Spa's Motion to Strike the Disclosure of Doug Schoon, and for Summary Judgment Re: Count I - Negligence. As counsel for Defendants, Mr. Wright is not competent to testify (1) as a medical expert or (2) as to the nature, contents, and meaning of Plaintiff's medical records. See I.R.E. 702. Defendants' counsel should not

be permitted to introduce into evidence Plaintiff's medical records or testify as to their meaning and effect.

DATED this the 2nd day of July, 2013.

JACOBSON & JACOBSON, PLLC

By: 
James F. Jacobson
Attorney for Plaintiff

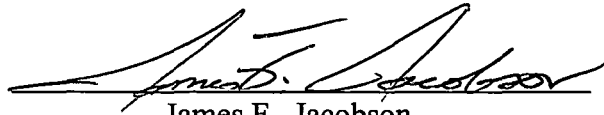
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of July, 2013, a true and correct copy of the foregoing was served upon the follow attorneys of record via method below:

David W. Knotts; Tracy L. Wright	<input checked="" type="checkbox"/>	U.S. Mail, postage prepaid
Carey Perkins, LLP	<input type="checkbox"/>	Hand-Delivered
Capitol Park Plaza	<input type="checkbox"/>	Overnight Mail
300 N. 6 th Street, Ste. 200	<input type="checkbox"/>	Facsimile (208) 529-0005
P. O. Box 519		
Boise, ID 83701		
<i>Attorneys for Defendant, Stacie Peabody and Fingerprints Day Spa</i>		

Jeffrey P. Heineman	<input checked="" type="checkbox"/>	U.S. Mail, postage prepaid
Heineman Law Office	<input type="checkbox"/>	Hand-Delivered
1501 Tyrell Lane	<input type="checkbox"/>	Overnight Mail
Boise, ID 83706	<input type="checkbox"/>	Facsimile (208) 947-9009
<i>Attorney for Defendant, Linda Cook</i>		

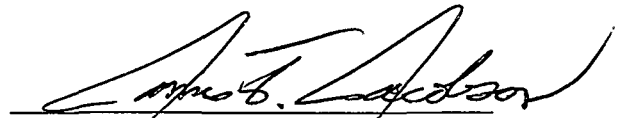
Margalit Z. Ryan	<input checked="" type="checkbox"/>	U.S. Mail, postage prepaid
Bauer & French	<input type="checkbox"/>	Hand-Delivered
P. O. Box 2730	<input type="checkbox"/>	Overnight Mail
Boise, ID 83701	<input type="checkbox"/>	Facsimile (208) 383-0412
<i>Attorney for Defendant, Linda Cook</i>		


James F. Jacobson

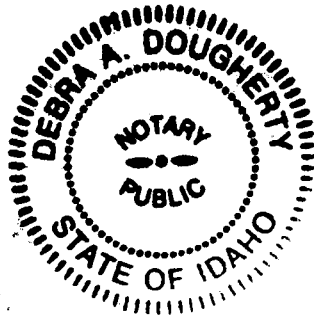
2. That attached hereto as Exhibit A is true and correct copy of the deposition of Stacie Peabody taken in this action on March 27, 2013.

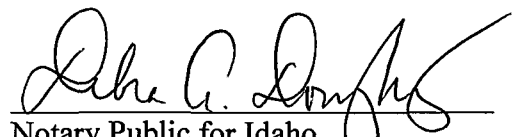
3. That attached hereto as Exhibit B are true and correct copies of inspection reports pertaining to Stacie Peabody and Fingerprints Day Spa that were produced pursuant to my subpoena in this action to the records custodian of the Idaho State Bureau of Occupational Licenses.

FURTHER, your Affiant sayeth naught.


James F. Jacobson

SUBSCRIBED AND SWORN to before me this 2nd day of July,
2013.




Notary Public for Idaho
Residing at Engle, Idaho
My Commission expires: 10-22-16

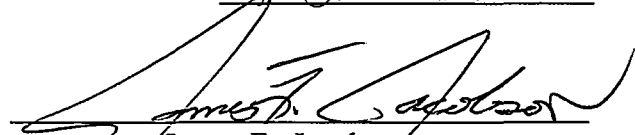
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of July, 2013, a true and correct copy of the foregoing was served upon the follow attorneys of record via method below:

David W. Knotts; Tracy L. Wright	<input checked="" type="checkbox"/>	U.S. Mail, postage prepaid
Carey Perkins, LLP	<input type="checkbox"/>	Hand-Delivered
Capitol Park Plaza	<input type="checkbox"/>	Overnight Mail
300 N. 6 th Street, Ste. 200	<input type="checkbox"/>	Facsimile (208) 529-0005
P. O. Box 519	<input checked="" type="checkbox"/>	Email:
Boise, ID 83701		dwknotts@careyperkins.com
<i>Attorneys for Defendant, Stacie Peabody</i>		tlwright@careyperkins.com
<i>and Fingerprints Day Spa</i>		

Jeffrey P. Heineman		
Heineman Law Office		
1501 Tyrell Lane	<input checked="" type="checkbox"/>	U.S. Mail, postage prepaid
Boise, ID 83706	<input type="checkbox"/>	Hand-Delivered
<i>Attorney for Defendant, Linda Cook</i>	<input type="checkbox"/>	Overnight Mail
	<input type="checkbox"/>	Facsimile (208) 947-9009
Margalit Z. Ryan	<input checked="" type="checkbox"/>	Email: jeff@heinemanlaw.com

Bauer & French		
P. O. Box 2730		
Boise, ID 83701	<input checked="" type="checkbox"/>	U.S. Mail, postage prepaid
<i>Attorney for Defendant, Linda Cook</i>	<input type="checkbox"/>	Hand-Delivered
	<input type="checkbox"/>	Overnight Mail
	<input type="checkbox"/>	Facsimile (208) 383-0412
	<input checked="" type="checkbox"/>	Email:
		mryan@bauerandfrench.com


James F. Jacobson

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRACY SALES, individually,)
 Plaintiff,)
 vs.) Case No. CV PI 1206516
STACIE PEABODY, individually)
and doing business under the)
assumed name of FINGERPRINTS)
DAY SPA; and LINDA COOK,)
individually;)
 Defendants.)

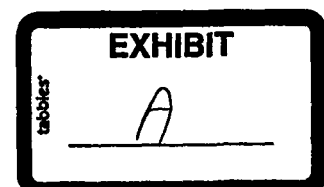
DEPOSITION OF STACIE PEABODY

MARCH 27, 2013

REPORTED BY:

EMILY L. NORD, CSR No. 695, RPR

Notary Public



000227

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<p>1 THE DEPOSITION OF STACIE PEABODY was taken on</p> <p>2 behalf of the Plaintiff at the offices of Carey Perkins,</p> <p>3 LLP, Capitol Park Plaza, 300 N. 6th Street, Suite 200,</p> <p>4 Boise, Idaho, commencing at 9:11 a.m. on Wednesday,</p> <p>5 March 27, 2013, before Emily L. Nord, Certified</p> <p>6 Shorthand Reporter and Notary Public within and for the</p> <p>7 State of Idaho, in the above-entitled matter.</p>	<p>1 STACIE PEABODY,</p> <p>2 first duly sworn to tell the truth relating to said</p> <p>3 cause, testified as follows:</p> <p>4</p> <p>5 MR. JACOBSON: Let the record reflect this is</p> <p>6 the time and place pursuant to notice for the taking of</p> <p>7 the deposition of Stacie Peabody, pursuant to the Idaho</p> <p>8 Rules of Civil Procedure.</p>
<p>9 A P P E A R A N C E S</p> <p>10</p> <p>11 For the Plaintiff Tracy Sales:</p> <p>12 Jacobson & Jacobson, PLLC</p> <p>13 BY MR. JAMES F. JACOBSON</p> <p>14 660 E. Franklin Road, Suite 110</p> <p>15 Meridian, ID 83642</p> <p>16</p> <p>17 For the Defendant Stacie Peabody and Fingerprints Day Spa:</p> <p>18 Carey Perkins, LLP</p> <p>19 BY MR. TRACY L. WRIGHT</p> <p>20 Capitol Park Plaza</p> <p>21 300 N. 6th Street, Suite 200</p> <p>22 P.O. Box 519</p> <p>23 Boise, ID 83701</p> <p>24</p> <p>25 Also Present: Tracy Sales; Marc Bybee, intern</p>	<p>9</p> <p>10 EXAMINATION</p> <p>11 QUESTIONS BY MR. JACOBSON:</p> <p>12 Q. Ms. Peabody, have you ever had your deposition</p> <p>13 taken before?</p> <p>14 A. No, sir.</p> <p>15 Q. I am sure that your attorney has oriented you,</p> <p>16 to some degree, as to what this process is going to be</p> <p>17 like. Let me go over -- which is a very basic, standard</p> <p>18 thing -- some rules and procedures that will help to</p> <p>19 make this process as smooth as possible.</p> <p>20 During the course of the deposition, the court</p> <p>21 reporter will be taking down what we say, my questions</p> <p>22 and your answers to those.</p> <p>23 A. Okay.</p> <p>24 Q. If there is a question that you don't</p> <p>25 understand, if you would let me know, and then I can</p>
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<p>1 I N D E X</p> <p>2</p> <p>3 TESTIMONY OF STACIE PEABODY PAGE</p> <p>4 Examination by Mr. Jacobson 4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10 E X H I B I T S</p> <p>11 (No exhibits were marked.)</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>1 either restate or rephrase or repeat the question in a</p> <p>2 way that helps you to better understand that. Is that</p> <p>3 okay?</p> <p>4 A. Absolutely.</p> <p>5 Q. In responding to my questions, you'll want to</p> <p>6 use audible words, such as yes and no, as opposed to</p> <p>7 sounds or gestures; which, while we typically use those</p> <p>8 when we converse, are very difficult for the court</p> <p>9 reporter to take down or create a record that's unclear.</p> <p>10 Is that okay?</p> <p>11 A. Yes.</p> <p>12 Q. If at any time you need to take a break,</p> <p>13 that's fine, and we can do that. If I have asked a</p> <p>14 question, then you'll need to answer that question</p> <p>15 before we take the break. Do you understand?</p> <p>16 A. Yes.</p> <p>17 Q. Great. And then is there anything today that</p> <p>18 would prohibit or inhibit you from giving complete and</p> <p>19 accurate answers in your deposition today?</p> <p>20 A. No.</p> <p>21 Q. All right. With that, then, we'll go ahead</p> <p>22 and proceed.</p> <p>23 My understanding is that you're the owner of a</p> <p>24 business called Fingerprints Day Spa; is that correct?</p> <p>25 A. Yes.</p>

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<p>1 Q. And Fingerprints Day Spa is actually an 2 assumed business name or a DBA; right? 3 A. Yes. 4 Q. And, really, the business is you; you're the 5 owner of the business? 6 A. Yes. 7 Q. And you have not incorporated the business at 8 any time, have you? 9 A. It is incorporated. 10 Q. It is incorporated now? 11 A. It's always been incorporated. 12 Q. When you say "incorporated," what do you 13 understand that to mean? 14 A. Tax breaks. 15 Q. So the business gets tax breaks? 16 A. Yes. 17 Q. Okay. But in terms of a filing with the 18 Secretary of State for the State of Idaho, the only 19 filing has been the assumed business name; right? 20 A. Well, I go by "Fingerprints, Inc." 21 Q. You go by "Fingerprints, Inc."? 22 A. Yeah. That's what -- yes. 23 Q. Okay. That's the assumed business name that 24 you're saying is filed with the Secretary of State? 25 A. I'm not sure. That's what it says on my</p>	<p>1 Q. -- spell that? 2 A. No. Can you? 3 Q. I'm just trying to help Madam Court Reporter 4 by having you spell that. 5 A. We can just say "professional skin care." 6 Q. And that's what an esthetician is? 7 A. Esthetician, correct. 8 Q. Okay. And so those are the services that 9 Fingerprints has provided over the last five years? 10 A. Yes. 11 Q. What does an esthetician do? 12 A. Skin care. 13 Q. I mean more specifically. You said 14 "professional skin care." What specifically do they do? 15 A. Well, I'm not exactly sure. I'm not an 16 esthetician. 17 Q. What is your training and background with 18 respect to -- 19 A. I'm a nail technician. 20 Q. Is there a licensure that you have to get in 21 order to be a nail technician in Idaho? 22 A. Yes. 23 Q. What is that licensure process? 24 A. Going to school, getting an education, passing 25 the State test, and staying current in your license.</p>
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<p>1 checkbook. 2 Q. All right. Anything else that you've done, by 3 way of filings with the Secretary of State, besides the 4 assumed business name? 5 A. No. 6 Q. How long have you owned this business, 7 Fingerprints Day Spa? 8 A. Probably about 25 years. 9 Q. And during that period, has the business been 10 located only in Boise, or has it been located other 11 places? 12 A. Boise. 13 Q. And you've been the only owner of the business 14 throughout that period; is that right? 15 A. Yes. 16 Q. And what is it that Fingerprints Day Spa does? 17 What services or products do they provide to people? 18 A. It's varied over the years. 19 Q. In the last five years, what has it been like? 20 A. We have had nail technicians, hairdressers, 21 and estheticians and massage therapists. 22 Q. You said one word that I don't recognize. 23 A. Esthetician? 24 Q. Esthetician. Could you -- 25 A. Skin care --</p>	<p>1 Q. What do you have to do to stay current in your 2 license? 3 A. Pay your fees. 4 Q. Any education requirements? 5 A. No. 6 Q. Just simply paying the fee to the State? 7 A. Paying the fee to the State. 8 Q. Do any of the other services that Fingerprints 9 has offered, those that you listed off, do they require 10 State licensure beyond being a nail technician? 11 A. Absolutely. 12 Q. Which ones require licensure? 13 A. To be an esthetician, it requires a license. 14 To be a cosmetologist requires a license. 15 Massage therapy does not require a license; 16 however, I've never leased to anyone that did not have a 17 license. So I ask that my massage therapists also be 18 licensed. But that is not a requirement of the State of 19 Idaho. 20 Q. But the State has a licensure process for 21 massage therapy even though it is not required? 22 A. Yes, it does. 23 Q. Okay. Where was the business located, 24 Fingerprints Day Spa's business located back in 2010? 25 A. 1414 Broadway Avenue.</p>

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<p>1 Q. Is it still located at that same place?</p> <p>2 A. No, it is not.</p> <p>3 Q. Where has it moved to now?</p> <p>4 A. The salon is closed, and has been for two</p> <p>5 years.</p> <p>6 Q. Do you remember approximately the date that</p> <p>7 the salon closed?</p> <p>8 A. I'm sorry, I don't.</p> <p>9 Q. Just approximately, month and year.</p> <p>10 A. Maybe March 2010. Maybe. I think it's been</p> <p>11 two years now.</p> <p>12 Q. Okay. That would be March of 2011, two years</p> <p>13 ago?</p> <p>14 A. Yeah.</p> <p>15 Q. Is that correct?</p> <p>16 A. '11, yeah. It's '13. Sorry.</p> <p>17 Q. That's okay.</p> <p>18 A. I'm still a year off.</p> <p>19 Q. That's okay.</p> <p>20 A. It's the time change.</p> <p>21 Q. Me too. Me too.</p> <p>22 What aspect of Fingerprints is still open?</p> <p>23 What services are you providing now?</p> <p>24 A. I do manicuring and pedicuring services at my</p> <p>25 home, where my name has still followed me, Fingerprints.</p>	<p>1 Q. And the chair for the hair station, was it</p> <p>2 just an ordinary chair like what you're sitting in now,</p> <p>3 or did it have any special features to it?</p> <p>4 A. It would be just like the chair you sit in</p> <p>5 when you get your hair cut. I'm sure you've been to a</p> <p>6 salon.</p> <p>7 Q. A long time ago. As you can see by my</p> <p>8 haircut, it's not complicated.</p> <p>9 A. Your wife does a good job.</p> <p>10 Q. Thank you. Thank you. I don't look as sharp</p> <p>11 as Tracy does.</p> <p>12 Now, what about a nail station; what goes into</p> <p>13 a nail station?</p> <p>14 A. I leased out vented nail tables, a chair, a</p> <p>15 stand, and a phone that goes on the stand, and pedicure</p> <p>16 chairs.</p> <p>17 Q. What is a vented nail station? Describe for</p> <p>18 me what that looks like and what it does.</p> <p>19 A. It looks like a desk with drawers that pulls</p> <p>20 nail dust down so it's not, you know, in the client's</p> <p>21 face.</p> <p>22 Q. Any other special features?</p> <p>23 A. No.</p> <p>24 Q. What about this pedicure station that you just</p> <p>25 described; describe that for me in more detail. What</p>
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<p>1 Q. And is there anybody else that offers services</p> <p>2 there at your home now?</p> <p>3 A. No. And it's not my home. I have a salon</p> <p>4 established, that's licensed and inspected by the State</p> <p>5 every year, behind my house. So it has a separate</p> <p>6 entrance and all that. It's just located where my home</p> <p>7 is.</p> <p>8 Q. Is it a completely separate structure from</p> <p>9 your home?</p> <p>10 A. No.</p> <p>11 Q. It is attached, but it's got a separate</p> <p>12 entrance?</p> <p>13 A. A separate entrance. And complies with all of</p> <p>14 the State regulations for a home salon.</p> <p>15 Q. Back in 2010, when Fingerprints was located at</p> <p>16 the other location that you referenced, could you</p> <p>17 describe for me the layout of the salon? And if it</p> <p>18 would help, I can have you draw it.</p> <p>19 A. Oh. Well, it was pretty basic. There were</p> <p>20 three hair stations, and three to four nail stations,</p> <p>21 and three treatment rooms downstairs.</p> <p>22 Q. What is a hair station? When you say "hair</p> <p>23 station," what did that entail?</p> <p>24 A. A sink, shelving for storage of products, and</p> <p>25 the chair.</p>	<p>1 features does it have?</p> <p>2 A. A massage chair that has a foot basin.</p> <p>3 Q. A massage chair with a foot basin?</p> <p>4 A. Correct.</p> <p>5 Q. And what's the purpose of this foot basin?.</p> <p>6 A. For doing pedicures.</p> <p>7 Q. Would people put their feet into the basin?</p> <p>8 Is that how that works?</p> <p>9 A. Uh-huh. Yes.</p> <p>10 Q. And I know that some of my questions may seem</p> <p>11 a little, kind of, simplistic in nature, but it's just</p> <p>12 to help me understand and to create a record to describe</p> <p>13 this.</p> <p>14 How big would these foot basins be?</p> <p>15 A. Oh, two feet by three feet, I believe.</p> <p>16 Q. And was it just an empty basin, or was it</p> <p>17 filled with something?</p> <p>18 A. Well, it was an empty basin until we filled it</p> <p>19 with water, and then it was filled with water.</p> <p>20 Q. And where would the water come from?</p> <p>21 A. The faucet.</p> <p>22 Q. When you say "the faucet," would someone take</p> <p>23 a bucket, put it under a faucet somewhere, and then dump</p> <p>24 it into the basin? Is that how that worked?</p> <p>25 A. No. They're professional chairs. They have</p>

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<p>1 running water drains, the whole nine yards, jets, all 2 that.</p> <p>3 Q. Okay. And all of that is part of this basin?</p> <p>4 A. Correct.</p> <p>5 Q. And how many of these pedicure stations did 6 you have back in 2010?</p> <p>7 A. Two.</p> <p>8 Q. Two. Now, all of this equipment that you have 9 just described that was part of the salon back in 2010, 10 you owned all of this equipment; is that right?</p> <p>11 A. Yes.</p> <p>12 Q. Do you recall the manufacturer's name as to 13 these pedicure stations?</p> <p>14 A. Swan.</p> <p>15 Q. And did they manufacture the full station, or 16 did they manufacture only part of it?</p> <p>17 A. No, it's a one-unit.</p> <p>18 Q. How would you describe yourself as a business 19 owner? Would you say you were hands-on or hands-off?</p> <p>20 MR. WRIGHT: Object to the form.</p> <p>21 You can answer.</p> <p>22 THE WITNESS: In what regard are you talking 23 about? I am unclear as to the question.</p> <p>24 Q. (BY MR. JACOBSON) Sure. As a business owner, 25 did you want to be involved in the day-to-day details of</p>	<p>1 I was personally doing the service. That's when I was 2 involved in a pedicure. If it was myself, working on my 3 client.</p> <p>4 Q. Tell me about your daily routine, then, back 5 in 2010. How would a typical day go for you?</p> <p>6 A. Well, I would get up, brush my teeth, get 7 dressed for work, take my kids to school, go to work, 8 check the phone, return calls that pertained to me 9 personally, and worked on my clients, and went home.</p> <p>10 Q. About when would you get to work?</p> <p>11 A. It depended. Usually around 8:00 or 9:00.</p> <p>12 Q. And how long would you be there during the 13 day?</p> <p>14 A. It depended. However long my appointments 15 lasted.</p> <p>16 Q. What was a typical day?</p> <p>17 A. 8:00 to 5:00, or 6:00, or 7:00. It depended.</p> <p>18 Q. Depended on what appointments that you had?</p> <p>19 A. Correct.</p> <p>20 Q. How frequently would you try to schedule 21 appointments, then?</p> <p>22 A. Every hour on the hour.</p> <p>23 Q. And how long would it take you, typically, to 24 service an appointment?</p> <p>25 A. It would depend on the appointment.</p>
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<p>1 the business, or were you someone that said, look, I'm 2 just -- I'm looking at the big picture?</p> <p>3 A. No --</p> <p>4 MR. WRIGHT: Object to the form.</p> <p>5 THE WITNESS: I can answer it.</p> <p>6 I attended to my own clients. I have my own 7 clients. I answer my own phone calls. I take care of 8 my clients. That's what I did, on a daily business, as 9 I went to work to service my clientele, people that were 10 on my appointment book.</p> <p>11 Q. (BY MR. JACOBSON) So if I'm understanding you 12 right, if they weren't your clients, they weren't your 13 appointment, you weren't concerned about what was 14 going --</p> <p>15 A. No.</p> <p>16 Q. -- on?</p> <p>17 You said that you had licensure as a nail 18 technician; is that right?</p> <p>19 A. Correct.</p> <p>20 Q. And is that exclusively what you did, or did 21 you do anything else?</p> <p>22 A. That's all I did.</p> <p>23 Q. And so you weren't involved in any of these 24 pedicure stations, as far as you working? Or were you?</p> <p>25 A. No. I was, if my client sat in the chair and</p>	<p>1 Q. Typically?</p> <p>2 A. An hour.</p> <p>3 Q. So you tried to space them an hour apart, and 4 it would typically take you an hour, then, to service?</p> <p>5 A. Yes.</p> <p>6 Q. How often were you not there? And this is, 7 again, back in 2010, approximately. Did you have 8 regular intervals where you weren't at the salon?</p> <p>9 A. Yes.</p> <p>10 Q. How often would those occur? What were those 11 intervals?</p> <p>12 A. Well, I was in a car accident, and there were 13 times that I was not in the shop for a month or two or 14 three.</p> <p>15 Q. You were in an automobile accident in --</p> <p>16 A. Correct.</p> <p>17 Q. -- 2010?</p> <p>18 A. Correct.</p> <p>19 Q. When were you in this --</p> <p>20 A. No, it was not in 2010. I was just having a 21 surgery as a result from a car accident.</p> <p>22 Q. When did you have your surgery in 2010?</p> <p>23 A. Oh, I don't know the exact date.</p> <p>24 Q. Approximately, month?</p> <p>25 A. Again, I don't know.</p>

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<p>1 Q. Was it at the beginning of the year or the end 2 of the year? 3 A. I think the beginning. 4 Q. And how much time did you miss as a result of 5 the surgery? 6 A. Again, I'm unclear why this line of 7 questioning is happening. 8 Q. That's okay. Just if you know the answer, you 9 can answer it. 10 A. Well, it would depend, you know. I think at 11 one point I missed three to four months of work. 12 Q. Is that three to four months straight? 13 A. Correct. 14 Q. And this was toward the beginning of 2010; am 15 I right? 16 A. I believe so. 17 Q. Okay. But you're not sure exactly when the 18 surgery took place? 19 A. I've had my arm rebuilt four times, so it's a 20 lot to keep track of. 21 Q. Aside from this, you know, three- to 22 four-month period in which you missed because of 23 surgery, were there regular days in which you were not 24 in the salon? And this is, again, in 2010. 25 A. Again, I'm unclear why that would matter.</p>	<p>1 Q. (BY MR. JACOBSON) Other people that performed 2 services -- 3 A. Wait a second. We need to get clear on 4 something here. You keep saying working as part of my 5 business. I had no one working as part of my business. 6 I was the business Fingerprints. I had other people 7 owning and operating and performing their own business 8 inside of mine. 9 So my business is my business. Everyone 10 else's business was everyone else's business. But you 11 keep trying to put it all together. 12 Q. Well, we're going to get clear about that; 13 okay? 14 A. Okay. 15 Q. Why don't you tell me who else was performing 16 services at the salon in April of 2010. 17 A. Let's see. I believe that I had four people 18 leasing from me at that time. And I'm not sure what 19 relevance it is to have anyone other than -- what we're 20 really talking about today is Linda Cook. 21 Q. That's okay. We're not here to decide what's 22 relevant or not relevant. 23 A. Right. 24 Q. We're just here to listen to the questions I 25 ask, and answer those questions. And I think your</p>
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<p>1 Q. I appreciate your concern. It's just a matter 2 of, if you don't know the answer to my question, then I 3 need you to answer it. 4 A. Could you please state it again. 5 Q. Sure. In 2010, were there regular days that 6 you were not in the salon? 7 A. I've already answered that. 8 Q. I don't believe you have. 9 A. Okay. I can't tell you the exact days that I 10 went to work and didn't go to work in 2010. There was a 11 period of time I missed work because of a surgery. But 12 I don't have the exact dates. I'm sorry. 13 Q. You keep an appointment book for your clients; 14 correct? 15 A. Correct. But I did not bring my appointment 16 book for 2010. 17 Q. You have an appointment book for 2010; is that 18 right? 19 A. I'm not sure that I do. 20 Q. Okay. If you do have an appointment book for 21 2010, if you would provide that to your counsel so that 22 he can produce that. 23 Now, you had other individuals that were 24 working as part of the business in April of 2010; right? 25 MR. WRIGHT: Object --</p>	<p>1 attorney has informed you of that. 2 A. Correct. 3 Q. So I need you to do that; okay? 4 A. This is what I remember, that Linda Cook 5 leased a spot from me in 2010. 6 Q. Who else leased spots from you in 2010? 7 A. I had a massage therapist that was leasing a 8 spot from me. 9 Q. What was her name? 10 A. It was a male. 11 Q. Male. 12 A. Jim. I can't remember Jim's last name. 13 And I had a couple hairdressers leasing spots 14 from me back then. And I don't really remember their 15 names either. 16 And my sister leased a spot from me. 17 Q. Do you have any records of who these people 18 were? 19 A. No, I don't. 20 Q. You didn't have any written lease agreements 21 with them either, did you? 22 A. Oh, absolutely. 23 Q. Do you have those lease agreements now? 24 A. No, I don't. 25 Q. Do you know where they are?</p>

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<p>1 A. Yes, I do.</p> <p>2 Q. Where are they?</p> <p>3 A. In the trash. After I closed my salon, I was</p> <p>4 rejoicing like nobody's business, and anything that</p> <p>5 pertained to my business went straight into the trash,</p> <p>6 because I was done.</p> <p>7 In fact, I'm not even sure I have old</p> <p>8 appointment books.</p> <p>9 Q. You don't have written independent contractor</p> <p>10 agreements with these people either, do you?</p> <p>11 A. I had written contract agreements, lease</p> <p>12 agreements, for everyone that ever leased a spot from me</p> <p>13 at Fingerprints. But when I closed my business, as I</p> <p>14 previously just stated, I threw everything away because</p> <p>15 who knew that I would need it three years later.</p> <p>16 Q. You said you were particularly rejoicing about</p> <p>17 closing down the salon. Is there any reason why?</p> <p>18 A. Yes.</p> <p>19 Q. Why was that?</p> <p>20 A. Because I have been doing this for 25 years,</p> <p>21 and I was hurt in a car accident, and I needed to just</p> <p>22 rest and be quiet. I've spent over two years in a chair</p> <p>23 from a car accident.</p> <p>24 Q. Besides the equipment that you described</p> <p>25 earlier, that you owned in relation to the salon, did</p>	<p>1 Q. Did you ever have any requirements of them as</p> <p>2 to when they needed to be at the salon?</p> <p>3 A. Absolutely not.</p> <p>4 Q. They could come and go as they chose?</p> <p>5 A. Yes.</p> <p>6 Q. They could set appointments as they wanted to?</p> <p>7 A. Yes.</p> <p>8 Q. What about lunch; were you ever concerned or</p> <p>9 upset when they would take a lunch?</p> <p>10 A. None of my business.</p> <p>11 Q. Did you ever provide any type of promotional</p> <p>12 offer or coupon-type offer in relation to the salon?</p> <p>13 MR. WRIGHT: Object to the form.</p> <p>14 THE WITNESS: Me personally?</p> <p>15 Q. (BY MR. JACOBSON) You or in relation to</p> <p>16 Fingerprints, generally.</p> <p>17 A. No. My clients -- I've had a full clientele</p> <p>18 for years.</p> <p>19 Q. Did you ever run a coupon book --</p> <p>20 A. Me personally?</p> <p>21 Q. -- offer? Yes.</p> <p>22 A. No.</p> <p>23 COURT REPORTER: If you would please wait for</p> <p>24 him to finish the question, that would be great.</p> <p>25 Q. (BY MR. JACOBSON) Why did you distinguish you</p>
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<p>1 you also provide tools and materials for . . .</p> <p>2 A. Absolutely not.</p> <p>3 Q. Who provided those?</p> <p>4 A. The "leasors."</p> <p>5 MR. WRIGHT: Just to be clear, I think you</p> <p>6 mean the "lessees."</p> <p>7 THE WITNESS: Lessees, yes, that's true.</p> <p>8 Sorry.</p> <p>9 Q. (BY MR. JACOBSON) As far as you, just the</p> <p>10 work that you did at the salon in 2010, what types of</p> <p>11 manicure and pedicure instruments would you use? Would</p> <p>12 they be wooden, or would they be metallic?</p> <p>13 A. I personally used metal, because it was easier</p> <p>14 to sanitize. What the other girls used, I can't tell</p> <p>15 you. It was up to them to decide what they used.</p> <p>16 Q. Did you ever observe what they used?</p> <p>17 A. I really did not.</p> <p>18 Q. So you couldn't say one way or the other as</p> <p>19 far as wooden or metallic for the other --</p> <p>20 A. Everyone --</p> <p>21 Q. -- technicians?</p> <p>22 A. -- used different stuff. You know, it was</p> <p>23 their personal decision to decide what they wanted to</p> <p>24 use in their business. Just like it's my personal</p> <p>25 decision to decide what I use in my business.</p>	<p>1 personally, no? Were there others that you were aware</p> <p>2 of that were offering coupon offers in relation to</p> <p>3 Fingerprints?</p> <p>4 A. Oh, yes. The girls would get together. You</p> <p>5 know, the new people that came in, signed leases, that</p> <p>6 were trying to get clientele, they would often get</p> <p>7 together as a group and run promotional ads.</p> <p>8 But me personally, I've had a full clientele</p> <p>9 for years, and I have had no need to do that.</p> <p>10 Q. So you never ran any coupon offer in relation</p> <p>11 to Fingerprints Day Spa and then required the other</p> <p>12 technicians to honor those coupons?</p> <p>13 A. No.</p> <p>14 Q. Did you get any additional money or percentage</p> <p>15 of service fees for work that the other technicians did?</p> <p>16 A. No.</p> <p>17 Q. You never got a piece of their service</p> <p>18 payment?</p> <p>19 A. I wished. No, I did not.</p> <p>20 Q. Were there ever any requirements as to the</p> <p>21 volume of customers that they needed to service?</p> <p>22 A. No.</p> <p>23 Q. Did you use gloves when you provided services</p> <p>24 at Fingerprints? And, again, this is back in 2010.</p> <p>25 A. No.</p>

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<p>1 Q. Did you observe any of the other technicians 2 that were there using gloves when they provided 3 services? 4 A. I don't recall. 5 Q. I want to ask you again about these foot 6 basins that you were describing in relation to the 7 pedicure stations. Was there any standard or 8 requirement with respect to the temperature of the water 9 that was in those basins? 10 MR. WRIGHT: Object to the form. 11 Q. (BY MR. JACOBSON) Did you place any 12 requirement as to what the temperature of the water 13 needed to be in those foot basins when pedicure services 14 were being performed using them? 15 A. No. 16 Q. Are you aware of any other standard that was 17 used at the salon in terms of the temperature of the 18 water in those foot basins? 19 A. No. 20 Q. Did anyone ever measure the temperature of the 21 water in the foot basins when they used them to perform 22 pedicure services? 23 MR. WRIGHT: Objection; foundation. 24 THE WITNESS: I don't know, you know. 25 Q. (BY MR. JACOBSON) Did you ever perform</p>	<p>1 are using in the foot basins. 2 Now, for myself, of course I know what the 3 water temperature is. I know that they've been 4 sanitized. I know that I am working on somebody that 5 has a medical condition. And I am aware of all of that. 6 What the other girls do when they do their 7 services, I have no idea what they do. It is none of my 8 business. What my business is, is when I work on my 9 clients only. 10 Q. When would you take the temperature of the 11 water when you serviced your clients? 12 A. Well, I would put my hand in it, and if it was 13 too hot for my hand, it was probably too hot for their 14 feet. 15 Q. What other procedures or protocols did you 16 undergo or perform with respect to people who had cuts 17 or sores on their feet? 18 A. I just answered that. 19 Q. Nothing else beyond what you just said? 20 A. Well, there's really not much more that I can 21 do, other than to make sure that everything I'm using is 22 cleaned, sanitized, even above industry standards, 23 especially for special needs clients such as diabetics. 24 Q. You were responsible for the cleaning and 25 sanitation of the equipment at the salon back in 2010;</p>
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<p>1 services using these pedicure foot basins? And this is, 2 again, back in 2010. 3 A. Yes. 4 Q. Did you ever take the temperature of the water 5 that you used in these foot basins? 6 A. No. 7 Q. Did you have any procedure or standard with 8 respect to providing services, using these foot basins, 9 for people who had cuts or sores on their feet? 10 A. Again, I'm unclear about your line of 11 questioning. In regards to my own clientele, yes. I do 12 a lot of people that are diabetic, that have special 13 needs; they're elderly. And I've always been very 14 cognizant of the temperature of the water, the 15 sanitation, my implements, because I do work on people 16 that have special needs. 17 And, yes, I have always taken every precaution 18 to make sure that my clients have the appropriate 19 temperature in their water, the appropriate sanitation. 20 And I go above and beyond just to make sure those 21 clients remain safe when I am working on my clients. 22 Q. Now, just so that I understand, you testified 23 just previously that you never took the temperature of 24 the water that you used in the foot basins. 25 A. That was the temperature of what other people</p>	<p>1 is that right? 2 MR. WRIGHT: Object to the form. Misstates 3 prior testimony. 4 Q. (BY MR. JACOBSON) Go ahead and answer if you 5 can. 6 A. I am responsible for when I use the pedicure 7 stations or any other thing in the salon, that I don't 8 rely on the last person, who should have cleaned and 9 sanitized it. I take my own initiative and sanitize it 10 again before my personal clients. 11 Q. And you took no other efforts to sanitize any 12 other tools or equipment at the salon other than the 13 ones that you used; is that right? 14 A. That is correct. 15 Q. What was your procedure or protocol for 16 cleaning and sanitizing the equipment that you used at 17 the salon back in 2010? 18 A. Well, I would clean the pedicure chair, 19 whether it looked clean or not. And I would run some 20 Let's Touch through the jets. And all my implements 21 were always soaked in Barbicide or put in the autoclave 22 before and after every client. 23 Q. So you went through that cleaning routine 24 before and after -- 25 A. Correct.</p>

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<p>1 Q. -- every client?</p> <p>2 A. That pertains to me and my personal clients</p> <p>3 only.</p> <p>4 Q. When you say "before and after," does that</p> <p>5 mean that, for each client that you serviced, there were</p> <p>6 two of these cleansing routines that you went through?</p> <p>7 A. No. I would only do the sanitizer before the</p> <p>8 jets, and the jets before my clients. But the tub is</p> <p>9 cleaned, you know, before and after every time.</p> <p>10 We have the cleanest pedicure stations in</p> <p>11 town.</p> <p>12 Q. How do you know that?</p> <p>13 A. Well, because I've been inspected. I've been</p> <p>14 in this business for a long time. With regards to the</p> <p>15 Bureau of Occupational Licenses, every time the salon</p> <p>16 had ever been inspected, we've only gotten grade A's.</p> <p>17 Everyone that leased from me, their individual</p> <p>18 stations got inspected for sanitizing and all that, and</p> <p>19 they always got A's. Anyone that's ever leased from me,</p> <p>20 or my business, personally has never gotten anything</p> <p>21 below a grade A.</p> <p>22 Q. Do you have any of these inspection report</p> <p>23 results?</p> <p>24 A. Again, I don't, but they're on file at the</p> <p>25 Bureau of Occupational Licenses.</p>	<p>1 So the inspector goes to each person and says,</p> <p>2 "What sanitizers are you using? Can we see your</p> <p>3 implements? What are you using to sanitize the pedicure</p> <p>4 chairs when you use them?"</p> <p>5 So the State comes in and regulates these</p> <p>6 girls. I don't have to.</p> <p>7 Q. Do you have any receipts as far as your</p> <p>8 purchase of sanitizing materials, such as the Barbicide</p> <p>9 that you mentioned, but any other sanitizing materials</p> <p>10 that you purchased in 2010?</p> <p>11 A. Probably not.</p> <p>12 May I say something? And I just --</p> <p>13 Q. Do you want to --</p> <p>14 A. I would like to say something. Again, I'm</p> <p>15 unclear what my receipts for my sanitizing for my</p> <p>16 clients, what relevance that would have on this case</p> <p>17 today. I'm confused as to that.</p> <p>18 Q. Ms. Peabody, this is a discovery deposition.</p> <p>19 A. Oh, okay.</p> <p>20 Q. And during the course of a discovery</p> <p>21 deposition, there is the opportunity for me to ask,</p> <p>22 normally, questions that have relevance, but that are</p> <p>23 reasonably calculated to lead to the discovery of</p> <p>24 admissible evidence.</p> <p>25 A. Okay.</p>
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<p>1 Q. Were you aware of any manufacturer</p> <p>2 requirements with respect to cleaning or sanitizing</p> <p>3 these foot basins?</p> <p>4 A. No.</p> <p>5 Q. And, again, it's your testimony that you don't</p> <p>6 have any idea what the other technicians did with</p> <p>7 respect to cleansing or sanitizing equipment or these</p> <p>8 stations?</p> <p>9 A. No. I basically relied on the Bureau of</p> <p>10 Occupational Licenses to do their job and inspect each</p> <p>11 business owner and give their inspection results.</p> <p>12 Everyone had their own inspection results at</p> <p>13 their stations. They had their license at their</p> <p>14 stations. The State came in and inspected everyone</p> <p>15 yearly, sometimes twice a year.</p> <p>16 So I relied on the State to do their job and</p> <p>17 say, yes, everyone that is working, leasing under you,</p> <p>18 under their own business, has met the State requirement.</p> <p>19 Q. Do you know how many State inspections</p> <p>20 occurred at your facility in 2010?</p> <p>21 A. I think two. About every six months.</p> <p>22 Q. And . . .</p> <p>23 A. And each person, just so you're clear, the</p> <p>24 lessors -- the lessees, are required by the State to</p> <p>25 have their own sanitation, their own everything.</p>	<p>1 Q. That casts a very broad net in terms of what I</p> <p>2 get to inquire into during the course of this</p> <p>3 deposition.</p> <p>4 A. Okay.</p> <p>5 Q. And, again, your testimony is that you have no</p> <p>6 knowledge as to what the other technicians were doing by</p> <p>7 way of cleaning routines, or disinfectant materials, or</p> <p>8 anything related to the sanitation of equipment or tools</p> <p>9 at the salon in 2010?</p> <p>10 MR. WRIGHT: Objection. Misstates her prior</p> <p>11 testimony.</p> <p>12 Q. (BY MR. JACOBSON) Go ahead and answer if you</p> <p>13 can, or clarify where you feel you need to.</p> <p>14 A. Well, again -- I'll repeat myself. Again, I</p> <p>15 rely on the State, the Bureau of Occupational Licenses,</p> <p>16 to come in and do their inspections on everyone that had</p> <p>17 their own individual license, working at the salon, to</p> <p>18 do their job. That is their job, not my job.</p> <p>19 Q. Did the State Bureau of Licenses give you any</p> <p>20 advanced notice as to when they would arrive for their</p> <p>21 inspections, or were they on a particular schedule?</p> <p>22 A. Never. It was all random.</p> <p>23 Q. Do you know who Tracy Sales is?</p> <p>24 A. I'm assuming it's this lady right here.</p> <p>25 Q. Have you ever had any interactions with Tracy</p>

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<p>1 Sales prior to today?</p> <p>2 A. No.</p> <p>3 Q. Have you ever spoken with Tracy Sales in the</p> <p>4 past?</p> <p>5 A. Not that I can remember.</p> <p>6 Q. Are you aware of any statements that Tracy</p> <p>7 Sales may have made in relation to Fingerprints Day Spa</p> <p>8 or to the subject matter of this lawsuit?</p> <p>9 A. No.</p> <p>10 Q. Have you ever had a conversation with Linda</p> <p>11 Cook regarding this lawsuit?</p> <p>12 A. Yes.</p> <p>13 Q. When did this conversation occur?</p> <p>14 A. Probably after you called me.</p> <p>15 Q. Would that have been in the spring of 2012?</p> <p>16 A. That would have been then, because I had no</p> <p>17 prior knowledge.</p> <p>18 Q. And what did you and Ms. Cook discuss when you</p> <p>19 called her?</p> <p>20 A. Well, me and Ms. Cook discussed that she had a</p> <p>21 problem.</p> <p>22 Q. And what was her problem?</p> <p>23 A. That somebody she didn't buy Nu Skin from is</p> <p>24 suing her.</p> <p>25 Q. Why did you say that to her?</p>	<p>1 Q. (BY MR. JACOBSON) Go ahead and answer if you</p> <p>2 can.</p> <p>3 A. Rephrase, please.</p> <p>4 Q. Do you have any other basis or reason for</p> <p>5 believing that this lawsuit is frivolous beyond the</p> <p>6 period in which it was brought?</p> <p>7 MR. WRIGHT: Object to the form. Calls for a</p> <p>8 legal conclusion.</p> <p>9 Q. (BY MR. JACOBSON) Go ahead and answer, if you</p> <p>10 can.</p> <p>11 A. I'm still not really understanding the</p> <p>12 question.</p> <p>13 Q. Any other reason why you think this lawsuit is</p> <p>14 frivolous besides what you said?</p> <p>15 MR. WRIGHT: I'll renew the objection.</p> <p>16 You can answer if you understand the question.</p> <p>17 THE WITNESS: No.</p> <p>18 Q. (BY MR. JACOBSON) During this conversation</p> <p>19 that you and Ms. Cook had in the spring of 2012, what</p> <p>20 else did you talk about besides Ms. Cook's problem?</p> <p>21 A. Well, the fact that Ms. Sales could have, at</p> <p>22 any time, again, talked to Linda, when she had talked to</p> <p>23 her several times after the alleged incident; which, I'm</p> <p>24 not sure what really happened there; that Ms. Sales</p> <p>25 could have gone to any number of salons, and not</p>
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<p>1 A. Because Linda and I had discussed that her and</p> <p>2 Ms. Sales had had somewhat of a relationship, that she</p> <p>3 had come to Linda several times and that Ms. Sales had</p> <p>4 tried to sell her some Nu Skin products. She declined.</p> <p>5 And that they had several conversations and</p> <p>6 opportunities for Ms. Sales to say that she was having</p> <p>7 problems with her pedicure, or her foot, and she never</p> <p>8 did.</p> <p>9 Q. Are you aware of Ms. Sales' medical treatment</p> <p>10 in any way?</p> <p>11 A. No.</p> <p>12 Q. Any other reason why you said that Linda Cook</p> <p>13 had a problem because she didn't buy Nu Skin from</p> <p>14 Ms. Sales?</p> <p>15 A. Well, I thought it was kind of a frivolous</p> <p>16 suit, given that it had been two years and Ms. Sales had</p> <p>17 never said to Linda that, "Hey, I'm having some</p> <p>18 problems. Could you look at it? Do you have anything?"</p> <p>19 I just thought it was rather weird that, two</p> <p>20 years later, that this would come up, when there was</p> <p>21 plenty of opportunity to discuss the matter before now.</p> <p>22 Q. Do you have any other reason to believe that</p> <p>23 the lawsuit is frivolous beyond the time frame in which</p> <p>24 it was brought?</p> <p>25 MR. WRIGHT: Object to the form.</p>	<p>1 disclosed that, and gotten pedicures somewhere else; she</p> <p>2 could have gone to the gym; she could have picked at her</p> <p>3 own toenail.</p> <p>4 And, in fact, that she's probably just trying</p> <p>5 to blame it on somebody else; that there was plenty of</p> <p>6 opportunity, for the condition that Ms. Sales has, to</p> <p>7 have gotten anywhere.</p> <p>8 Q. And these were statements that you made to</p> <p>9 Linda Cook?</p> <p>10 A. Oh, no. We discussed it back and forth. I</p> <p>11 mean, it's just like, really? After two years?</p> <p>12 Q. What did Linda Cook say to you in regard to,</p> <p>13 well, this could have happened somewhere else?</p> <p>14 A. Well, Ms. Cook is under the opinion that I</p> <p>15 have, that this could have been taken care of far sooner</p> <p>16 than it was; that if Ms. Sales had gone, seen a doctor,</p> <p>17 opened her mouth to Ms. Cook and said, "You know, I'm</p> <p>18 having some problems. Would you like to take a look at</p> <p>19 it?" Instead of just, you know, trying to sell her</p> <p>20 Nu Skin after the pedicure.</p> <p>21 Q. Were you aware of any of Ms. Sales' other</p> <p>22 activities, such as going to gyms or other pedicure or</p> <p>23 manicure places?</p> <p>24 A. No; that's just an assumption. Those are many</p> <p>25 of the places that somebody could get any kind of foot</p>

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<p>1 infection or toe infection, you know. I mean, I'm sure</p> <p>2 Ms. Sales didn't only come to my salon in the period of</p> <p>3 two years, and she's never done anything else to --</p> <p>4 Q. That's just speculation on your part, isn't</p> <p>5 it?</p> <p>6 A. Absolutely, speculation.</p> <p>7 Q. Any other statements that you made to Ms. Cook</p> <p>8 or that she made to you during this phone conversation</p> <p>9 in the spring of 2012?</p> <p>10 A. No; other than that we just assumed that</p> <p>11 Ms. Sales probably got it somewhere else and was just</p> <p>12 looking for someone to blame.</p> <p>13 Q. Have you had any conversations with Ms. Cook</p> <p>14 since that telephone call in the spring of 2012?</p> <p>15 A. Yes.</p> <p>16 Q. When?</p> <p>17 A. Oh, I'm not sure.</p> <p>18 Q. Approximately when?</p> <p>19 A. Oh, I don't know; three weeks ago she called</p> <p>20 to see if I could give her the name of an</p> <p>21 air-conditioning guy that worked on our furnace -- that</p> <p>22 worked on my furnace at Fingerprints, and I gave her the</p> <p>23 name of somebody that could work on her furnace.</p> <p>24 Q. Besides this conversation three weeks ago,</p> <p>25 have you had any other communications with Ms. Cook</p>	<p>1 clients would call her, that we would always be able to</p> <p>2 take care of it in a responsible manner; saying, "Well,</p> <p>3 you know, you may need to see a doctor," or, "Here, come</p> <p>4 back in and let me see what I can do," or whatever. You</p> <p>5 know. Usually there's an easier, softer way.</p> <p>6 Q. So if a client had a problem after being</p> <p>7 serviced by you, you would want to observe and evaluate</p> <p>8 it to determine whether they needed additional medical</p> <p>9 attention?</p> <p>10 MR. WRIGHT: Object to the form.</p> <p>11 THE WITNESS: Well, I think you're taking this</p> <p>12 the wrong way. I mean, Ms. Sales --</p> <p>13 Q. (BY MR. JACOBSON) Ms. Peabody, I'm just</p> <p>14 trying to understand your response.</p> <p>15 A. What I'm saying is, if a client has a problem,</p> <p>16 usually -- I don't know what kind of relationship</p> <p>17 Ms. Sales and Linda had, but I know what kind of</p> <p>18 relationship I have with my clients.</p> <p>19 And I know that -- like I've had clients that</p> <p>20 have had pedicures, and they say to me, "Well, I've got</p> <p>21 an ingrown toenail. Would you look at it?" And I say,</p> <p>22 "Sure."</p> <p>23 You know, if there's a problem or whatever,</p> <p>24 usually the client relationship, once you've serviced</p> <p>25 somebody more than once, it's -- you care about that</p>
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<p>1 about this lawsuit?</p> <p>2 A. No.</p> <p>3 Q. Are you aware of any other statements that</p> <p>4 Ms. Cook has made in relation to this lawsuit or the</p> <p>5 incident that's involved in it?</p> <p>6 A. Not other than I've already stated.</p> <p>7 Q. Who else have you spoken with about this</p> <p>8 lawsuit besides your attorney?</p> <p>9 A. My sister.</p> <p>10 Q. What is your sister's name?</p> <p>11 A. Debbie Hatch.</p> <p>12 Q. And what have you and Debbie discussed</p> <p>13 regarding this lawsuit?</p> <p>14 A. Probably the frivolity of it.</p> <p>15 Q. Do you mean the frivolous nature of it?</p> <p>16 A. Correct.</p> <p>17 Q. And what have you discussed in relation to the</p> <p>18 frivolous nature of this lawsuit?</p> <p>19 A. Well, just the fact that it's been two years.</p> <p>20 And my sister has also been in the business a long time,</p> <p>21 20 years, and she has never had any clients at any time</p> <p>22 have any problems. I've never had any clients at any</p> <p>23 time have any problems.</p> <p>24 And that, you know, usually if a client does</p> <p>25 have a problem, they would call me, or if my sister's</p>	<p>1 person, and you want to make sure they're okay and that</p> <p>2 your service is okay.</p> <p>3 And if someone is communicating to you, you</p> <p>4 can say, "Well, here, let me take a look at it."</p> <p>5 You know, I've sent my clients to doctors for</p> <p>6 skin cancers that I've seen on their feet and their</p> <p>7 legs. Or I've recognized circulation problems in their</p> <p>8 feet, and I've said, you know, "I think you need to go</p> <p>9 see a doctor. This doesn't look right to me. It's not</p> <p>10 normal." You know, things like that.</p> <p>11 Like, I was actually surprised that, given the</p> <p>12 couple times -- I don't know. Linda kind of said her</p> <p>13 and Ms. Sales had a relationship. So I was surprised</p> <p>14 that Ms. Sales didn't say anything about her problem, as</p> <p>15 her and Linda's relationship grew about her problem,</p> <p>16 until a lawsuit. She had plenty of opportunities in</p> <p>17 regards with Ms. Cook to say something to her.</p> <p>18 Q. Do you feel that it's your responsibility,</p> <p>19 when you're servicing clients, that you have to</p> <p>20 determine when they may or may not need to seek medical</p> <p>21 treatment?</p> <p>22 MR. WRIGHT: I'm going to object to the form.</p> <p>23 THE WITNESS: No, it is not my responsibility.</p> <p>24 Q. (BY MR. JACOBSON) Is that something that is</p> <p>25 part of the State licensure for nail technicians?</p>


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<p>1 A. No, it is not.</p> <p>2 Q. Is that an expectation that you would have</p> <p>3 with respect to the other nail technicians that were</p> <p>4 working at Fingerprints Day Spa back in 2010?</p> <p>5 MR. WRIGHT: Object to the form.</p> <p>6 THE WITNESS: No, it is not. I do that with</p> <p>7 my personal clients, because I care.</p> <p>8 Now, what the other girls do with their</p> <p>9 clients is their decision.</p> <p>10 Q. (BY MR. JACOBSON) Anything else you and your</p> <p>11 sister Debbie have spoken about in relation to this</p> <p>12 lawsuit?</p> <p>13 A. Again, you know, women that work, doing the</p> <p>14 same kind of work, everyone owns their own business,</p> <p>15 does their same kind of clients; we're all just taken</p> <p>16 back a little bit by the fact that Ms. Sales waited this</p> <p>17 long and didn't, you know, say anything to anybody about</p> <p>18 her problem, and then all of a sudden decides to pin it</p> <p>19 on Linda.</p> <p>20 Q. Who are these other people that you're</p> <p>21 referring to?</p> <p>22 A. Well, basically me, Linda, and, you know, of</p> <p>23 course I've discussed it with my sister. I mean, I</p> <p>24 asked her, "In 25 years, have you ever had a client that</p> <p>25 has had any problems?" "No."</p>	<p>1 involving Ms. Sales?</p> <p>2 A. I have absolutely done nothing wrong.</p> <p>3 Q. Besides the cleaning procedure that you</p> <p>4 described that you went through with respect to your</p> <p>5 clients, where you would clean the station before</p> <p>6 servicing the client and after servicing the client, did</p> <p>7 you do any other cleansing or sanitizing activities?</p> <p>8 A. In regards to my own personal stuff?</p> <p>9 Q. Yes.</p> <p>10 A. Oh, absolutely, yes.</p> <p>11 Q. What else would you do?</p> <p>12 A. Well, we keep all of our -- well, I keep all</p> <p>13 of my implements, and, actually, all of the girls kept</p> <p>14 all of their stuff in sanitation stuff. I mean --</p> <p>15 because it's required by the State law.</p> <p>16 So everyone that worked in that building that</p> <p>17 had their own business, everyone basically observed the</p> <p>18 same sanitation. We would all clean our implements in</p> <p>19 sanitizing containers, including myself. Because if we</p> <p>20 get inspected, we could lose our licenses.</p> <p>21 Everyone is individually licensed. If the</p> <p>22 State board comes in and you're not in compliance with</p> <p>23 the sanitation, you could lose your license. And, you</p> <p>24 know, we don't know when we're going to be inspected.</p> <p>25 Q. Would everyone in the facility lose their</p>
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<p>1 Have I ever had a client that's had any other</p> <p>2 problems? No.</p> <p>3 "Linda, have you had a client that's ever had</p> <p>4 any other problems?" "No."</p> <p>5 Q. Anyone else that you've spoken to about this</p> <p>6 lawsuit that you haven't named for me yet?</p> <p>7 A. No.</p> <p>8 Q. Anyone else that you've spoken with about the</p> <p>9 incident involving Ms. Sales back in April of 2010?</p> <p>10 A. No.</p> <p>11 Q. And I just want to be clear in terms of your</p> <p>12 testimony. Is it your testimony that, with regard to</p> <p>13 the other technicians that were performing services at</p> <p>14 Fingerprints Day Spa back in 2010, that you had no</p> <p>15 control or oversight or responsibility for their</p> <p>16 activities in servicing clients?</p> <p>17 A. I had zero control.</p> <p>18 Q. And, again, is it your testimony that you took</p> <p>19 no other efforts and you had no other responsibility for</p> <p>20 cleaning equipment, tools, including the foot basins, on</p> <p>21 any station except the ones that you personally serviced</p> <p>22 clients at?</p> <p>23 A. That's correct.</p> <p>24 Q. And is it your testimony that you believe that</p> <p>25 you have done nothing wrong in relation to the incident</p>	<p>1 license?</p> <p>2 A. No, just the individual. It's an individual</p> <p>3 thing, you know. So everyone kept their stuff sanitized</p> <p>4 and in sanitizers, because, again, the inspector would</p> <p>5 come in and inspect every individually licensed person.</p> <p>6 Q. What type of sanitizing solution would you</p> <p>7 keep your tools in?</p> <p>8 A. It's called Let's Touch or Barbicide. Those</p> <p>9 are the industry standards.</p> <p>10 Q. And did the other technicians also keep their</p> <p>11 tools in the same sanitizing solution?</p> <p>12 MR. WRIGHT: Objection; foundation.</p> <p>13 THE WITNESS: I can answer it.</p> <p>14 I'm assuming so, because the Bureau of</p> <p>15 Occupational Licenses gave them a grade A sanitation.</p> <p>16 So they were inspected; they got their</p> <p>17 grade A; so I'm assuming they did. Unless, of course,</p> <p>18 the, you know, Bureau of Occupational Licenses wasn't</p> <p>19 doing their job.</p> <p>20 Q. (BY MR. JACOBSON) What other sanitation</p> <p>21 activities would you go through besides keeping your</p> <p>22 tools in the sanitation solution that you described?</p> <p>23 A. Really there's no other. I mean, that's it.</p> <p>24 You sanitize your implements; you clean your stuff, you</p> <p>25 know, before you use it; and that's what you do.</p>

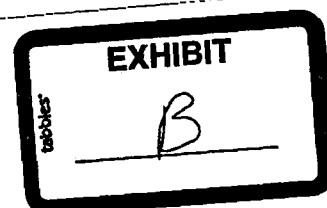
Stacie Peabody 3/27/2013

Page 46	Page 48
<p>1 Q. What about with regard to the other</p> <p>2 technicians; what did you observe them do by way of</p> <p>3 cleaning or sanitizing activities?</p> <p>4 MR. WRIGHT: Objection; asked and answered.</p> <p>5 THE WITNESS: It's already been answered.</p> <p>6 Q. (BY MR. JACOBSON) You can go ahead and answer</p> <p>7 again.</p> <p>8 A. Well, to be honest with you, I really pretty</p> <p>9 much focused on my clients and what I was doing. The</p> <p>10 other girls, they had their own thing going on. It was</p> <p>11 their business. It was none of mine.</p> <p>12 Q. And the only reason that I ask, Ms. Peabody,</p> <p>13 is that you had just testified that you observed that</p> <p>14 they kept their tools in a sanitizing solution that was</p> <p>15 the same thing that you were keeping yours in.</p> <p>16 A. Well, what I observed is that they had their</p> <p>17 license and that they had their inspection at their</p> <p>18 thing, at their stations. That's what I observed.</p> <p>19 So if they had their license and their</p> <p>20 inspection that says "A," they had their stuff in State</p> <p>21 -- they had their stuff in whatever the State requires</p> <p>22 them to have their sanitizing stuff in. And I can't</p> <p>23 tell you if they used the same stuff I did, but I'm</p> <p>24 assuming, again, that the Bureau of Occupational</p> <p>25 Licenses did their job when they inspected these gals.</p>	<p>1 Q. And did you obtain any college or secondary</p> <p>2 education beyond high school?</p> <p>3 A. Yes.</p> <p>4 Q. What did you receive by way of secondary</p> <p>5 education?</p> <p>6 A. I went to nail school and got my license.</p> <p>7 Q. And so when were you first licensed as a nail</p> <p>8 technician in Idaho?</p> <p>9 A. When I was 20 years old.</p> <p>10 Q. And since that time to the present -- and you</p> <p>11 can correct me if I'm wrong --</p> <p>12 A. Okay.</p> <p>13 Q. Since that time to the present, is that the</p> <p>14 same period approximately that you had Fingerprints Day</p> <p>15 Spa?</p> <p>16 A. Oh, no. I worked for a couple other salons</p> <p>17 before I opened my own company.</p> <p>18 Q. Are any of those salons that you worked for</p> <p>19 still in business that you know?</p> <p>20 A. I don't know.</p> <p>21 Q. Do you recall the names of these other salons</p> <p>22 that you've worked for?</p> <p>23 A. Uh-huh (nodding head).</p> <p>24 Q. What are they?</p> <p>25 A. Let's see. Looks Unlimited. The Place To Be.</p>
Page 47	Page 49
<p>1 Q. And I believe you said that the Bureau of</p> <p>2 Occupational Licenses made their inspections no more</p> <p>3 than twice a year?</p> <p>4 A. Correct.</p> <p>5 Q. Ms. Peabody, did you grow up in the Treasure</p> <p>6 Valley?</p> <p>7 A. No.</p> <p>8 Q. Where were you born?</p> <p>9 A. Idaho Falls.</p> <p>10 Q. And how long did you live in Idaho Falls?</p> <p>11 A. Probably until I was, like, five or six.</p> <p>12 Q. And then where did you move after that?</p> <p>13 A. California.</p> <p>14 Q. And how long did you live in California?</p> <p>15 A. About four years.</p> <p>16 Q. Did you move around frequently growing up?</p> <p>17 A. Yes. My father was in the military.</p> <p>18 Q. I'm not going to ask you to go through that</p> <p>19 catalog, then.</p> <p>20 A. Well, I certainly can.</p> <p>21 Q. Where did you graduate from high school at?</p> <p>22 A. Boise High.</p> <p>23 Q. So when did you move to Boise; do you remember</p> <p>24 that?</p> <p>25 A. In 1980.</p>	<p>1 Yeah, those are the two shops I worked for before I</p> <p>2 opened my own company.</p> <p>3 Q. Do you remember approximately the year that</p> <p>4 you started Fingerprints Day Spa?</p> <p>5 A. Let me see. I think 1987.</p> <p>6 Q. Are you married?</p> <p>7 A. Yes.</p> <p>8 Q. And how long have you been married?</p> <p>9 A. Ten years.</p> <p>10 Q. And what is your husband's name?</p> <p>11 A. Jim Baugh.</p> <p>12 Q. And have you ever spoken with Jim about this</p> <p>13 lawsuit?</p> <p>14 A. No.</p> <p>15 Q. The two of you have never talked about it?</p> <p>16 A. We're separated right now.</p> <p>17 Q. I see. How long have you been separated?</p> <p>18 A. Two years.</p> <p>19 Q. Do you have any children?</p> <p>20 A. Yes.</p> <p>21 Q. How many children do you have?</p> <p>22 A. Two. My son Tanner is 21, and my daughter</p> <p>23 Shyanne is 19.</p> <p>24 Q. Have you ever talked to Tanner or Shyanne</p> <p>25 about this lawsuit?</p>

Stacie Peabody 3/27/2013

Page 50	Page 52
1 A. No.	1 CHANGE SHEET FOR STACIE PEABODY
2 Q. They're not interested?	2 Page ___ Line ___ Reason for Change _____
3 A. No. God no.	Reads _____
4 MR. JACOBSON: I don't think that I have any	3 Should Read _____
5 other questions at this time.	4 Page ___ Line ___ Reason for Change _____
6 MR. WRIGHT: I don't have any questions.	Reads _____
7 (Deposition concluded at 10:12 a.m.)	5 Should Read _____
8 (Signature requested.)	6 Page ___ Line ___ Reason for Change _____
9	Reads _____
10	7 Should Read _____
11	8 Page ___ Line ___ Reason for Change _____
12	Reads _____
13	9 Should Read _____
14	10 Page ___ Line ___ Reason for Change _____
15	Reads _____
16	11 Should Read _____
17	12 Page ___ Line ___ Reason for Change _____
18	Reads _____
19	13 Should Read _____
20	14 Page ___ Line ___ Reason for Change _____
21	Reads _____
22	15 Should Read _____
23	16 Page ___ Line ___ Reason for Change _____
24	Reads _____
25	17 Should Read _____
	18 Page ___ Line ___ Reason for Change _____
	Reads _____
	19 Should Read _____
	20 Page ___ Line ___ Reason for Change _____
	Reads _____
	21 Should Read _____
	22 Page ___ Line ___ Reason for Change _____
	Reads _____
	23 Should Read _____
	24 Please use a separate sheet if you need more room.
	25 WITNESS SIGNATURE _____
Page 51	Page 53
1 CERTIFICATE OF WITNESS	1 REPORTER'S CERTIFICATE.
2 I, STACIE PEABODY, being first duly sworn, depose	2 I, EMILY L. NORD, CSR No. 695, Certified
3 and say:	3 Shorthand Reporter, certify:
4 That I am the witness named in the foregoing	4 That the foregoing proceedings were taken
5 deposition, consisting of pages 1 through 50; that I	5 before me at the time and place therein set forth, at
6 have read said deposition and know the contents thereof;	6 which time the witness was put under oath by me;
7 that the questions contained therein were propounded to	7 That the testimony and all objections made
8 me; and that the answers contained therein are true and	8 were recorded stenographically by me and were thereafter
9 correct, except for any changes that I may have listed	9 transcribed by me, or under my direction;
10 on the Change Sheet attached hereto.	10 That the foregoing is a true and correct
11 DATED this ___ day of ___, 2013.	11 record of all testimony given, to the best of my
12	12 ability.
13	13 I further certify that I am not a relative or
14 STACIE PEABODY	14 employee of any attorney or party, nor am I financially
15 SUBSCRIBED AND SWORN to before me this ___ day of	15 interested in the action.
16 ___, 2013.	16 IN WITNESS WHEREOF, I set my hand and seal
17	17 this 1st day of April, 2013.
18	18
19 NAME OF NOTARY PUBLIC	19 
20	20
21 NOTARY PUBLIC FOR _____	21 EMILY L. NORD, CSR, RPR
22 RESIDING AT _____	22 Notary Public
23 MY COMMISSION EXPIRES _____	23 P.O. Box 2636
24	24 Boise, Idaho 83701-2636
25	25 My Commission expires November 5, 2017.

**INSPECTIONS OF FINGER PRINTS, CS-6091
2007 - PRESENT**



000241

STATE OF IDAHO
DEPARTMENT OF SELF-GOVERNING AGENCIES
BUREAU OF OCCUPATIONAL LICENSES
IDAHO BOARD OF COSMETOLOGY

CS-6091*

Inspection No. 20070724

CS-6091	3/11/1998
FINGER PRINTS	
STACIE PEABODY	
1414 BROADWAY	
BOISE, ID, 83706	

Inspection Date:	7/18/2007	Shop Phone No:	208 384-9908
Final Score:	100	Investigator:	Kevin Malveaux
Comments:			
Notes:	Igoff - 09/01/2011: OOB STACIE PEABODY Confirmed by NEW NEW SALON IN HOME		

Item	Item	Detail Notes	Weight	Points Off
1	Premises			
	a. Shall be open to inspection during business hours to agents of the Board.			
	b. Shall be separated from living areas by substantial walls and/or closable doors.			
	c. Shall be maintained in an orderly manner.			
	d. Shall be heated, lighted, & ventilated so as to be safe & comfortable to the operators & patrons.			
2	Floors, Walls and Ceilings			
	a. Floors shall be kept clean and in good repair at all times.			
	b. Walls shall be kept clean and in good repair at all times.			
	c. Ceilings shall be kept clean and in good repair at all times, furniture, and all other fixtures			
	d. Furniture shall be kept clean and in good repair at all times.			
	e. All other fixtures shall be kept clean and in good repair at all times.			
3	Instrument Cleaning			
	a. All instruments used shall be thoroughly cleaned prior to storage.			
4	Instrument Sanitizing			
	a. All instruments shall be sanitized after cleaning & prior to use, with an EPA sanitizing agent.			
	b. Every precaution shall be taken to prevent the transfer of disease-causing pathogens.			
5	Towels			
	a. Clean towels shall be used for each patron.			
	b. A clean paper or cloth neckband shall provide a sanitary barrier between a patron's neck & cape.			
	c. Paper towels & paper neckstrips shall be disposed of after one (1) use.			
6	Storage of Equipment			
	a. All instruments shall be stored in clean & closed containment after sanitizing.			
	b. All towels shall be stored in clean & closed containment after sanitizing.			
	c. All linens shall be stored in clean & closed containment after sanitizing.			
7	Dispensers			
	a. All solutions & compounds shall be maintained & dispensed in a sanitary manner.			
	b. All single-use applicators shall be disposed of after one (1) use.			
	c. All bulk & multi-use solutions & compounds shall be maintained free of foreign contaminants.			

Run Time: 4/19/2013 12:44:29 PM

STATE OF IDAHO
DEPARTMENT OF SELF-GOVERNING AGENCIES
BUREAU OF OCCUPATIONAL LICENSES
IDAHO BOARD OF COSMETOLOGY

CS-6091*

Inspection No. 20070724

CS-6091	3/11/1998
FINGER PRINTS	
STACIE PEABODY	
1414 BROADWAY	
BOISE, ID, 83706	

Inspection Date:	7/18/2007	Shop Phone No:	208 384-9908
Final Score:	100	Investigator:	Kevin Malveaux
Comments:			
Notes:	Igoff - 09/01/2011: OOB STACIE PEABODY Confirmed by NEW NEW SALON IN HOME		

Item	Item	Detail Notes	Weight	Points Off
8	Uniforms			
	a. All clothing worn by operators shall be clean			
	b. All clothing worn by operators shall be washable			
9	Water Supply			
	a. Water supplies shall be from an approved source.			
	b. Sufficient basins available			
	c. Hot and cold running water, & approved drainage systems			
	d. Soap shall be conveniently located within the work area			
	e. Single-use towels shall be conveniently located within the work area			
	f. Every operator and/or student shall wash their hands prior to providing service to any patron.			
10	Toilet Facilities			
	a. No adequate or convenient toilet facilities			
	b. No hot and cold running water, basin or approved disposal system			
	c. No soap			
	d. No single use towels			
	e. Failure to maintain clean or sanitary condition			
11	Safety			
	a. A clearly identifiable first-aid kit must be readily accessible on the premises.			
	b. No animals are allowed in shops or schools.			
12	Certificates			
	a. A current establishment license shall be conspicuously displayed in the work area.			
	b. Establishments must be under the direct supervision of a licensed operator.			
	c. Valid operator license(s) shall be conspicuously displayed in the work area.			
	d. A copy of the sanitary rules shall be conspicuously displayed in the work area.			
	e. A valid classification card shall be conspicuously displayed in the work area.			
13	Licenses			
	a. No establishment license			

Run Time: 4/19/2013 12:44:29 PM

STATE OF IDAHO
DEPARTMENT OF SELF-GOVERNING AGENCIES
BUREAU OF OCCUPATIONAL LICENSES
IDAHO BOARD OF COSMETOLOGY

CS-6091*

Inspection No. 20070724

CS-6091	3/11/1998
FINGER PRINTS	
STACIE PEABODY	
1414 BROADWAY	
BOISE, ID, 83706	

Inspection Date:	7/18/2007	Shop Phone No:	208 384-9908
Final Score:	100	Investigator:	Kevin Malveaux
Comments:			
Notes:	lgoff - 09/01/2011: OOB STACIE PEABODY Confirmed by NEW NEW SALON IN HOME		

Item	Item	Detail Notes	Weight	Points Off
b.	No personal operator's license			
c.	Not conspicuously displayed			
Totals for Inspection			100	0

Grading - 'A' for a score of 90 through 100; 'B' for a score of 80 through 89; and 'C' for a score of 79 or below. The 'C' classification denotes unacceptable conditions. Required improvements must be demonstrated within thirty (30) days for continued operation. These inspection requirements are in accord with the laws of the State of Idaho and the rules of the IDAHO BOARD OF COSMETOLOGY.

Remarks: NT-244 1/1/08, NT-234462 1/21/08, NT-745 10/14/07, EST-233984 9/14/08

Run Time: 4/19/2013 12:44:29 PM

STATE OF IDAHO
DEPARTMENT OF SELF-GOVERNING AGENCIES
BUREAU OF OCCUPATIONAL LICENSES
IDAHO BOARD OF COSMETOLOGY

CS-6091*

Inspection No. 20091223

CS-6091	3/11/1998
FINGER PRINTS	
STACIE PEABODY	
1414 BROADWAY	
BOISE, ID, 83706	

Inspection Date:	12/23/2009	Shop Phone No:	208 384-9908
Final Score:	95	Investigator:	Warren Schiffer
Comments:	111 121 41		
Notes:	lgoff - 09/01/2011: OOB STACIE PEABODY Confirmed by NEW NEW SALON IN HOME		

Item	Item	Detail Notes	Weight	Points Off
1	Premises			
	1. All shops and schools shall be open to inspection during business hours to authorized agents of the			
2	Floors, Walls and Ceilings			
	1. Floors, walls, ceilings, furniture, and all other fixtures shall be kept clean and in good repair at			
3	Instrument Cleaning			
	1. All instruments used by operators shall be thoroughly cleaned after each use and prior to storage an			
4	Instrument Sanitizing			
	1. All instruments used by operators shall be sanitized after cleaning and prior to use on each patron,	needs hospital grade sanitizer for files and brushes		2
5	Towels			
	1. Clean towels shall be used for each patron. A clean paper or cloth neckband shall be used to provide			
6	Storage of Equipment			
	1. All instruments, towels, and linens shall be stored in clean, closed cabinets, drawers, and/or conta			
7	Dispensers			
	1. All solutions and/or compounds shall be clearly labeled, maintained, and dispensed in a sanitary man			
8	Uniforms			
	1. All clothing worn by operators shall be clean and washable.			
9	Water Supply			
	1. Water supplies shall be from an approved source. Sufficient basins with hot and cold running water,			
10	Toilet Facilities			
	1. Clean, adequate and convenient toilet facilities, located and accessible from within the building wh			
11	Safety			
	1. Each shop and school shall have a clearly identifiable first-aid kit readily accessible on the premi	Band aids		1

Run Time: 4/19/2013 12:44:00 PM

STATE OF IDAHO
DEPARTMENT OF SELF-GOVERNMENT AGENCIES
BUREAU OF OCCUPATIONAL LICENSES
IDAHO BOARD OF COSMETOLOGY

CS-6091*

Inspection No. 20091223

CS-6091	3/11/1998
FINGER PRINTS	
STACIE PEABODY	
1414 BROADWAY	
BOISE, ID, 83706	

Inspection Date:	12/23/2009	Shop Phone No:	208 384-9908
Final Score:	95	Investigator:	Warren Schiffer
Comments:	111 121 41		
Notes:	Igooff - 09/01/2011: OOB STACIE PEABODY Confirmed by NEW NEW SALON IN HOME		

Item	Item	Detail Notes	Weight	Points Off
12	Licenses and Certificates			
	1. All shops and schools must be licensed prior to their operation and must be under the direct supervi	Not conspicuous		2
Totals for Inspection			100	5

Grading - 'A' for a score of 90 through 100; 'B' for a score of 80 through 89; and 'C' for a score of 79 or below. The 'C' classification denotes unacceptable conditions. Required improvements must be demonstrated within thirty (30) days for continued operation. These inspection requirements are in accord with the laws of the State of Idaho and the rules of the IDAHO BOARD OF COSMETOLOGY.

Remarks:

**IDAHO BUREAU OF OCCUPATIONAL LICENSES
BARBER AND BEAUTY SHOP AND SCHOOL INSPECTION FORM**

IDAPA 24.04.01.800 AND 24.02.01.550

WEIGHT POINTS OFF

01. Premises. All shops and schools shall be open to inspection during business hours to authorized agents of the Cosmetology/Barber Boards. Shops and schools must be separated from living areas by substantial walls and/or closable doors. All shops and schools must be maintained in an orderly manner and shall be heated, lighted, and ventilated so as to be safe and comfortable to the operators and patrons.....	5	
02. Floors, Walls, and Ceilings. Floors, walls, ceilings, furniture, and all other fixtures shall be kept clean and in good repair at all times	5	
03. Instrument Cleaning. All instruments used by operators shall be thoroughly cleaned after each use and prior to storage and/or sanitation.....	15	
04. Instrument Sanitation. All instruments used by operators shall be sanitized after cleaning and prior to use on each patron, with a sanitizing agent registered by the Environmental Protection Agency as Hospital Grade or better. Every precaution shall be taken to prevent the transfer of disease-causing pathogens from person to person	15	1
05. Towels. Clean towels shall be used for each patron. A clean paper or cloth neckband shall be used to provide a sanitary barrier which shall be maintained between each patron's neck and all multi-use capes. Paper towels and paper neck-strip shall be disposed of after one (1) use	5	
06. Storage of Equipment. All instruments, towels, and linens shall be stored in clean, closed cabinets, drawers, and/or containers after they are cleaned and sanitized	5	1
07. Dispensers. All solutions and/or compounds shall be clearly labeled, maintained, and dispensed in a sanitary manner. All single-use applicators shall be disposed of after one (1) use. Paraffin, waxes and all other solutions and/or compounds shall be maintained free of any foreign contaminants.....	5	1
08. Uniforms. All clothing worn by operators shall be clean and washable.....	5	
09. Water Supply. Water supplies shall be from an approved source. Sufficient basins with hot and cold running water, approved drainage systems, soap and single-use towels shall be conveniently located within the work area. Every operator and/or student shall wash their hands prior to providing service to any patron	10	
10. Toilet Facilities. Clean, adequate and convenient toilet facilities, located and accessible from within the building where the shop or school is located, shall be available for use by operators and patrons. A basin with hot and cold running water, approved drainage systems, soap and single-use towels shall be provided within said facilities.....	10	
11. Safety. Each shop and school shall have a clearly identifiable first-aid kit readily accessible on the premises. No animals are allowed in shops or schools except those animals trained to provide service to the physically impaired	5	
12. Licenses and Certificates. All shops and schools must be licensed prior to their operation and must be under the direct supervision of a licensed operator. A current shop and/or school license, valid operator license(s) or permit(s), a copy of these rules, and a valid classification card shall be conspicuously displayed in the work area of each shop and/or school for the information of operators, Board agents, and the public in general	15	4
GRAND TOTAL.....	93	7
	100	

NOTES:

#12 CS-6091 Facility License EXPIRED 03-11-11/NOT DISPLAYED

#12 Rules/LAWS NOT DISPLAYED

#4 BARBERSHOP needs changed

#6 Hair in DRAWER #7 Cotton Disp. UNCOVERED

Classification of Shops and Schools. Following an inspection, each shop and school will receive a classification as follows: 100% - 90% = "A," 89% - 80% = "B," 79% and below = "C." The "C" classification denotes an unacceptable rating and improvements are required within thirty (30) days for continued operation.

Investigator: Randy H Facility Representative: William JInspection Date: 3-30-11

COPY TO BE RETAINED BY LICENSEE

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Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

TRACY SALES, individually;)	Case No. CV PI 1206516
)	
Plaintiff,)	
)	SUBPOENA DUCES TECUM
vs.)	
)	
STACIE PEABODY, individually and doing)	
business under the assumed name of)	
FINGERPRINTS DAY SPA; and LINDA)	
COOK, individually;)	
)	
Defendants.)	
_____)	

THE STATE OF IDAHO SENDS GREETINGS TO:

**IDAHO BUREAU OF OCCUPATIONAL LICENSES
RECORDS CUSTODIAN
Attention: Dawn Hall
700 West State Street
P.O. Box 83720
BOISE, ID 83720-0063**

YOU ARE HEREBY COMMANDED to forward the following items and/or
documents:

1. Any and all documents relating to Stacie Peabody dba Finger Prints Day Spa and/or Stacie Peabody, including but not limited to any documents pertaining to any inspection or inspections of a facility owned, operated by, managed, or participated in by the above referenced person for the period of 2007 to the present.

and

[] Must appear at said place and time with requested documents and shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

or

[X] Produce the requested documents at Jacobson & Jacobson, PLLC, 660 E. Franklin Rd., Suite 110, Meridian, Idaho 83642, on or before Monday, May 6, 2013 instead of appearing at the location below. The documents shall be produced as they are kept in the usual course of business or shall be organized and labeled to correspond with the categories in the demand.

DATE AND TIME: Thursday, the 6th day of May, 2013 at 5:00 p.m.

PLACE: Jacobson & Jacobson, PLLC, 660 E. Franklin Road,
Suite 110, Meridian, ID

The basis of the request for the above records from the foregoing is that Plaintiff, Tracy Sales, has brought a lawsuit in the above-entitled matter against Stacie Peabody. The above-referenced documents are necessary to evaluate the claims and defenses in the above-entitled matter.

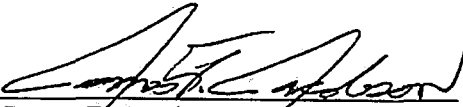
Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other

persons who consent to testify on its behalf and may set forth, for each person designated, the matters on which the person will testify. Idaho R. Civ. P. 30(b)(6).

YOU ARE FURTHER NOTIFIED that if you fail to provide the above-listed items and/or documents by May 6, 2013, that you may be held in contempt of Court and that the aggrieved party may recover from you the sum of One Hundred Dollars (\$100.00) and all damages which Plaintiff may sustain by your failure to comply.

DATED this 11th day of April, 2013.

JACOBSON & JACOBSON, PLLC

By 
James F. Jacobson, Of the Firm
Attorneys for Plaintiff


CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 11th day of April 2013, I served a true and correct copy of the foregoing **SUBPOENA DUCES TECUM** by delivering the same to the following attorney of record, by the method indicated below, addressed as follows:

David W. Knotts; Tracy L. Wright
Carey Perkins, LLP
Capitol Park Plaza
300 N. 6th Street, Ste. 200
P. O. Box 519
Boise, ID 83701

☐ U.S. Mail, postage prepaid
☐ Hand-Delivered
☐ Overnight Mail
☒ Facsimile (208) 345-8660

*Attorneys for Defendant, Stacie Peabody
and Fingerprints Day Spa*


James F. Jacobson

NO. _____
FILED _____
A.M. _____ P.M. 420

JUL 02 2013

CHRISTOPHER D. RICH, Clerk
By CHELSIE PINKSTON
DEPUTY

JAMES F. JACOBSON, ISB #7011
ROBERT W. JACOBSON, ISB # 7156
JACOBSON & JACOBSON, PLLC
660 E. Franklin Road, Suite 110
Meridian, ID 83642
Telephone: (208) 884-1995
Facsimile: (208) 477-5210
Email: james@jjlawidaho.com
Email: bob@jjlawidaho.com

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL

DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRACY SALES, individually;

Plaintiff,

vs.

STACIE PEABODY, individually and doing
business under the assumed name of
FINGERPRINTS DAY SPA; and LINDA
COOK, individually;

Defendants.

Case No. CV PI 1206516

AFFIDAVIT OF DOUG SCHOON

STATE OF CALIFORNIA)
) ss:
COUNTY OF ORANGE)

DOUG SCHOON, being first duly sworn upon oath, deposes and says:

1. That this Affidavit of Doug Schoon is submitted in support of Plaintiff's Memorandum In Opposition to Defendants' Stacie Peabody and Fingerprints Day Spa's Second Motion for Summary Judgment and Motion To Strike.

2. That your Affiant is President of Schoon Scientific and Regulatory Consulting, LLC and Co-Chair Nail Manufacturers Council Professional Beauty Association.

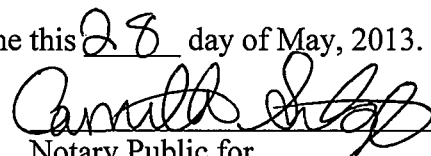
3. That attached hereto is Exhibit A, a true and correct copy of my opinion dated May 9, 2013, which contains information as to my qualifications as an expert and my opinions expressed in this action pursuant to Idaho Rules of Evidence 702-705 and as disclosed pursuant to Idaho Rules of Civil Procedure 26(b)(4).

FURTHER, your Affiant sayeth naught.


Doug Schoon

SUBSCRIBED AND SWORN to before me this 28 day of May, 2013.




Notary Public for
State of California
Residing at Dana Point, CA
My Commission expires: 3/29/2017

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of July, 2013, a true and correct copy of the foregoing was served upon the follow attorneys of record via method below:

David W. Knotts; Tracy L. Wright
Carey Perkins, LLP
Capitol Park Plaza
300 N. 6th Street, Ste. 200
P. O. Box 519
Boise, ID 83701
*Attorneys for Defendant, Stacie Peabody
and Fingerprints Day Spa*

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☐ Hand-Delivered
☐ Overnight Mail
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☒ Email:
dwknotts@careyperkins.com
tlwright@careyperkins.com

Jeffrey P. Heineman
Heineman Law Office
1501 Tyrell Lane
Boise, ID 83706
Attorney for Defendant, Linda Cook

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☐ Email: jeff@heinemanlaw.com

Margalit Z. Ryan
Bauer & French
P. O. Box 2730
Boise, ID 83701
Attorney for Defendant, Linda Cook

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☒ Email:
mryan@bauerandfrench.com


James F. Jacobson

EXPERT WITNESS REPORT OF DOUG SCHOON

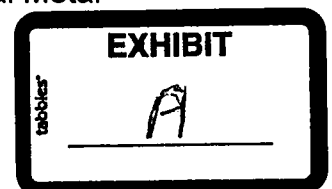
I submit this written report which contains the following: (1) my qualifications, which are set forth in the attached curriculum vitae which is made a part of this report as though fully set forth herein, including a list of publications which I've authored within the preceding 10 years; (2) a statement of opinions to be expressed and the basis and reasons therefore; (3) the data or information which I considered in forming my opinions; (4) any exhibits to be used as a summary of or support for my opinions;

I. Qualifications

- A. M.S. Chemistry, University of California-Irvine, 1984.
- B. Twenty-five years' experience in the professional and retail nail salon industry.
- C. A leading scientific researcher, educator and internationally known author of four industry textbooks, as well as many chapters in dermatology and beauty industry reference books, dozens of educational articles, tapes, videos, DVD's, etc.
- D. Scientific expert specializing in the formulation of manicure, pedicure, natural and artificial nail products, salon services and procedures, product quality, labeling, warnings, regulations, proper handling and safe use.
- E. Scientific expertise in ingredients and materials used in products designed for natural, artificial nails, manicure and pedicure products.
- F. Scientific expertise in chemical testing and analysis of ingredients and materials used in products designed for natural, artificial nails, manicure and pedicure products.
- G. Scientific expert specializing in salon common/best practices, standards of care and client interactions.
- H. Serves as an industry liaison to NGO groups, associations and government organizations and specializes in US and Canadian cosmetic product regulations and ingredient issues.
- I. My attached CV lists additional relevant experience and qualifications.

II. List of References Used for Basis of Opinion

- A. Deposition of Tracy Sales, Vol. 1
- B. Deposition of Tracy Sales, Vol.2
- C. Deposition of Stacie Peabody
- D. Answers to Plaintiff's First Interrogatory, Stacie Peabody
- E. Plaintiff's Answers First Interrogatory, Tracy Sales
- F. Idaho Administrative Code, IDAPA 24.04.01, Rules of the Idaho Board of Cosmetology.
- G. Title 54, Professions, Vocations, and Businesses, chapter 8, 54-824. Establishments inspection Rules and chapter 5, 54-524. Inspections.
- H. Letter from Dr. Jeffrey Chandler, April 11, 2013
- I. Product label artwork for Let's Touch, Hospital and Salon Tuberculocidal Metal Disinfectant, Isabel Christina.
- J. State Board of Idaho, Bureau of Occupational Licenses, Idaho Board of Cosmetology, inspection reports.



IV. Opinion

Overview of Opinions

Opinion 1- Stacey Peabody did not properly clean and disinfect her pedicure tub unit. Improper cleaning and disinfection of such units is a leading cause of leg/foot related infections in nail establishments and her failure to do so significantly increase the potential for clients to develop directly related skin infections due to microbial cross-contamination.

Opinion 2- Stacey Peabody failed to properly follow label directions and by doing so misused an EPA registered disinfectant, Let's Touch, and created a potential infection risks for clients.

Opinion 3- An owner of a nail establishment, Stacey Peabody is responsible for providing safe conditions for workers, clients, visitors, etc. and she is incorrect to place this responsibility on the inspectors working for the Idaho Bureau of Occupational Licenses or the Board of Cosmetology.

Opinion 4- It is the responsibility of a nail establishment owner to assume the role of salon manager, unless the owner specifically assigns these tasks to another person under their management who is properly trained to perform these duties. It is not correct to claim these tasks are responsibility of the inspectors working for the Idaho Bureau of Occupational Licenses or the Board of Cosmetology.

Opinion 5- Stacey Peabody failed to make efforts to ensure those working in her establishment were doing so safely and properly; actions which can significantly increase the potential for transmission of infectious organisms, e.g. bacteria, fungi or viruses.

Opinions with Supporting Information

Opinion 1- Stacey Peabody did not properly clean and disinfect her pedicure tub unit. Improper cleaning and disinfection of such units is a leading cause of leg/foot related infections in nail establishments and her failure to do so significantly increase the potential for clients to develop directly related skin infections due to microbial cross-contamination.

- When asked to describe her procedures for cleaning and disinfecting her pedicure tub unit, Stacey Peabody claims, *"... I would run some Let's Touch through the jets."* This is an improper use of an EPA registered product as well as, being ineffective as a disinfectant for this purpose and when used in this manner.
- Many pedicure related infection are caused by improper cleaning and disinfection of the pedicure tub units and in my experience units with pipes that direct water are the most often implicated in pedicure related infections.

Opinion 2- Stacey Peabody failed to properly follow label directions and by doing so misused an EPA registered disinfectant, Let's Touch, and created a potential infection risks for clients.

- Let's Touch is not designed or approved for use in the manner in which Stacey Peabody claimed to have used the product, nor would it have resulted in proper or effective disinfection of the pedicure tub units her nail establishment.
- Let's Touch products are of high quality and have high efficacy when used in accordance with the labeling instructions and all warnings are heeded, but that was not done by Stacey Peabody.
- The product labeling direction's for Let's Touch says, *"it is a violation of federal law to use this product in a manner inconsistent with its labeling."* The remainder of the label provides instructions on how to disinfect "instruments". The products label does not recommend or provide usage instructions for any type of pedicure tubs and constitutes misuse for Stacey Peabody to use Let's Touch in the fashion she's claimed in her deposition. (Page 29)
- The product's labeling clearly states that the proper use for this product is with *"metal salon instruments including manicurist nippers and cuticle pushers, shears and metal skin care instruments"*. Therefore it is a federal requirement that this disinfectant be used only on metal instruments and is effective only when diluted, used and stored as directed on the Let's Touch product label.
- Improper use of an EPA registered disinfectant reduces disinfection efficacy and may leave a surface covered with residual contamination that could later result in an infection and provides no assurance that clients are protected from microbial cross-contamination.

Opinion 3- An owner of a nail establishment, Stacey Peabody is responsible for providing safe conditions for workers, clients, visitors, etc. and she is incorrect to place this responsibility on the inspectors working for the Idaho Bureau of Occupational Licenses or the Board of Cosmetology.

- Federal OSHA CFR 29, 1910 requires business owners to ensure safe working conditions and under the Hazard Communication Standard they are required to provide warnings and effective training related to minimizing workplace exposure to potentially hazardous substances.
- Due to the too few inspectors, it would be highly unusual to for a state board inspector to visit a nail establishment several times per year, unless the salon had drawn attention due to previous violations of the rules and/or regulations. More typically, salon establishment inspections occur at 18 to 36 month intervals. Therefore, it is unreasonable to assume these rare inspections ensure those working in her nail establishment were working safely.

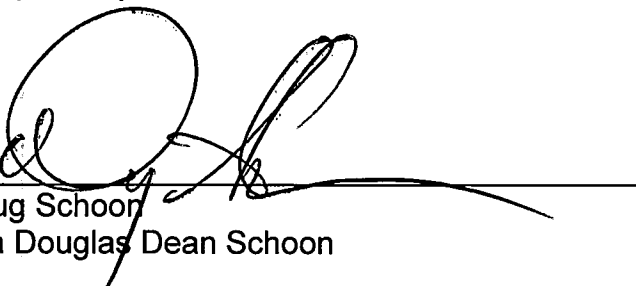
- Inspection reports from the State of Idaho Bureau of Occupational Licenses, Board of Cosmetology demonstrate that Stacey Peabody's nail establishment was suspected every two years, 2007, 2009, and 2011. In 2009 and 2011, points were deducted from her personal inspection score in relation to improper "Instrument Sanitizing".
- In 2011, Stacey Peabody's citation was for failing to properly change the disinfectant used to disinfect salon implements as required while in 2009 two points were again deducted and the reason cited was, *"needs hospital grade sanitizer for files and brushes"*.

Opinion 4- It is the responsibility of a nail establishment owner to assume the role of salon manager, unless the owner specifically assigns these tasks to another person under their management who is properly trained to perform these duties. It is not correct to claim these tasks are responsibility of the inspectors working for the Idaho Bureau of Occupational Licenses or the Board of Cosmetology.

- When asked what she knew about the other technicians cleaning and disinfection procedures, Stacie Peabody stated, *"No. I basically relied on the Bureau of Occupational Licenses to do their job and inspect each business owner and given their inspection results... So I relied on the state to do their job and say, yes, everyone that is working, leasing under you, under their own business, has met the state requirements... That's their job, that's not my job."* (Page 31) and she claims to have, *"I had zero control."* (Page 43).

Opinion 5- Stacey Peabody failed to make efforts to ensure those working in her establishment were doing so safely and properly; actions which can significantly increase the potential for transmission of infectious organisms, e.g. bacteria, fungi or viruses.

Respectfully submitted,



Doug Schoon
Aka Douglas Dean Schoon

Doug Schoon
M.S. Chemistry

Scientific, Regulatory and Technical Expert
for the Cosmetic, Beauty and Personal Care Industry

Specializing in International Beauty/Cosmetic/Personal Care Development, Testing, Safety,
and Regulations with Extensive Expertise in Salon Products, Services and Best Practices



President
Schoon Scientific & Regulatory Consulting, LLC

and

Co-Chair Nail Manufacturers Council
Professional Beauty Association

Contact Information

Doug Schoon
33935 Crystal Lantern
Dana Point, CA. 92629

949-275-8779 (cell)
949-493-3380 (office)
949-493-3191 (fax)

Federal Id # 35-2317462

DSchoon@SchoonScientific.com

Websites

www.SchoonScientific.com
www.DougSchoon.com

Synopsis of Expertise

Doug Schoon is considered a leading technical, regulatory and scientific expert in beauty, cosmetic and personal care industry. For 20 years he served as the Vice President of Science & Technology of a world-class research and development laboratory and is now a highly respected scientific, technical and regulatory consultant. Schoon often provides expert testimony before courts, as well as, domestic and international regulatory bodies and panels. His expertise in the salon/cosmetic/personal care industry is broad and includes on all aspects of professional beauty salons and services; skin care, cosmetology, pedicure, manicure and artificial nail products/procedures, cosmetic personal/care product development, quality, labeling, warnings, regulations, as well as proper handling and safe use. Schoon is a world renowned scientist, author and educator for the professional salon industry specializing in risk identification, communication and prevention.

Schoon works as an industry liaison to NGO groups, associations and government organizations and specializes in US and Canadian cosmetic product regulations and ingredient issues. Besides his considerable chemical and scientific expertise, he is also knowledgeable in the fields of toxicology, polymer science, materials testing.

Beauty Industry Related Job Experience

- Masters of Science Degree in Chemistry, University of California-Irvine (1982-84).
- President, Schoon Scientific + Regulatory Consulting, LLC (2007- present)
- Chief Scientific Adviser- Creative Nail Design, Inc (2007-present)
- V.P., Science & Technology- Creative Nail Design, Inc. (1988-2007).
- Co-Chair, Nail Manufacturer's Council/Professional Beauty Association (2003- present)
- Executive Director and Founder of Chemical Awareness Training Service (1986-92).
- Consulting Chemist for the American Beauty Association (1987-2003).
- American Beauty Association, Safety and Standards Co-Chair (1999-2003)
- Author of several salon safety and chemistry books for beauty professionals.
- Author of many informational/best practices brochures for beauty professionals
- Author of audio-cassette and video safety training programs for beauty salons.
- Works with State, Federal and International regulators to develop beauty industry related standards and regulations.
- Experienced working with Canada, Australia, EU, and Japanese cosmetic regulatory agencies and many domestic and international trade associations.
- Over thirty years experience as a researcher, lecturer, author and educator.
- World renowned expert; considered a leading scientist in the field with extensive expertise in ingredient safety of professional salon and retail products.

Publications/Books

(2012) Contributing author to Baran & Dawber's Diseases of the Nails and their Management to be published by Wiley in late 2012.

(2012) Contributing author to Nanotechnology in Cosmetics, authored "Nanotechnology and Nails", to be published by Springer in late 2012.

(2011) Contributing author to Atlas of Cosmetic Dermatology 5th Ed. - co-authored two chapters, "Cosmetology for Normal Nails" and "Cosmetics for "Abnormal and Pathologic Nails".

(2009) Contributing author to Cosmetic Dermatology 2nd Ed, Z. Draelos- authored a chapter entitled, "Nail Prosthetics".

(2009) Contributing author to Atlas of Cosmetic Dermatology 4th Ed. - co-authored two chapters, "Cosmetology for Normal Nails" and "Cosmetics for "Abnormal and Pathologic Nails".

(2007 and 2009) Contributing author to Milady's *Standard Hair Technology*, 2008 and 2010 editions- the leading textbook used to instruct student hair professionals around the world.

(2007, 2009 and 2012) Contributing author to Milady's *Standard Nail Technology*, 5th, 6th and 7th edition- the leading textbook used to instruct student nail professionals around the world.

(2005) Author of Milady's *Nail Structure and Product Chemistry* 2nd edition- a book that teaches basic through intermediate level product chemistry and discusses the natural nail and related professional products and services.

(2003) Contributing author to Milady's *Standard Nail Technology*, 4th edition- the leading text book used to instruct student nail professionals around the world.

(1994) Author of Milady's *HIV/AIDS & Hepatitis- Everything You Need to Know to Protect Yourself and Others*. Book addressing communicable diseases in beauty salon.

(1996) Author of Milady's *Nail Structure and Product Chemistry*- a book that teaches basic through intermediate level product chemistry and discusses issues related to the natural nail.

(1998 & 2005) Co-author of several chapters in *Cosmetic Dermatology*, Edited by Dr. R. Baran- book teaching practicing dermatologist about the cosmetics of the skin, nails and hair.

(1988) Author of the videotape and manual ...*For Your Health! The Guide to Professional Salon Chemical Safety*- the industry's first "Right-to-Know" training program for beauty salons/schools.

(1990) Editor and Publisher of *The Key... to Unlock the Mysteries of Modern Nail Technology*. An audiocassette magazine for nail artist focusing on salon safety and natural nail health.

(1993) Author of *Milady's Hair Structure and Chemistry Simplified*- a book with accompanying *Experiment Manual* designed for cosmetology/beauty school students and instructors.

Also, many dozens of articles for beauty industry and trade magazines since 1989 and remains a regular contributor to several professional beauty industry trade magazines including; *ExceptionNail* (Canada), *Professional Beauty* (Australia) *Nails* and *NailPro* (US), *Scratch* (United Kingdom), *Nails Magazine* (US).

Education

1984 University of California- Irvine, CA. Masters Degree/Chemistry
1982 California State University- Long Beach, CA. Bachelors Degree/Chemistry
1974 Medical Laboratory Technician Training, U.S. Army, Fort Sam Houston, TX

As well as, many years of additional advanced education classes in; toxicology, anatomy, physiology, polymer chemistry, cosmetic chemistry and material science, critical thinking, etc.

Employment History

Schoon Scientific + Regulatory Consulting ,LLC

Dana Point, CA.

Title: President (7/07 to present)

Creative Nail Design, Inc.

Vista, CA.

Title: Chief Scientific Advisor (6/07 to present)

Creative Nail Design, Inc

Vista, CA.

Title: V.P of Science and Technology (12/88 to 6/07)

Chemical Awareness Training Service/Newport Beach, CA.

Title: Executive Director and Founder (1986 to 1992)

Bacon Industries/Irvine, CA.

Title: Director of Research and Development (1985-1988)

MD Pharmaceuticals/Costa Mesa, CA.

Title: Researcher (1984-1985)

ROK Industries/San Pedro, CA.

Title: Laboratory Manager (1981-1982)

Shell Oil Laboratory/Carson, CA.

Title: Laboratory Technician (1978-1980)

St. Mary's Hospital/Long Beach, CA.

Title: Laboratory Technician (1976-1978)

U.S. Army- Natick Research Labs

Title: Research Laboratory Technician (1974-1976)

Industry References

George Schaffer, President

OPI Products, Inc. 818-759-2400

Jan Arnold, Co-Founder

Creative Nail Design, Inc. 760-599-2900

Deborah Carver, Publisher

NailPro Magazine 818-782-7328

Cindy Drummey, Publisher

Nails Magazine 310-533-2400

Many additional references available on request

NO. _____
A.M. _____ P.M. 420

JUL 02 2013

CHRISTOPHER D. RICH, Clerk
By CHELSIE PINKSTON
DEPUTY

JAMES F. JACOBSON, ISB #7011
ROBERT W. JACOBSON, ISB # 7156
JACOBSON & JACOBSON, PLLC
660 E. Franklin Road, Suite 110
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Telephone: (208) 884-1995
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Email: james@jjlawidaho.com
Email: bob@jjlawidaho.com

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL

DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRACY SALES, individually;

Plaintiff,

vs.

STACIE PEABODY, individually and doing
business under the assumed name of
FINGERPRINTS DAY SPA; and LINDA
COOK, individually;

Defendants.

Case No. CV PI 1206516

**AFFIDAVIT OF
JEFFREY L. CHANDLER, D.P.M**

STATE OF IDAHO)
) ss:
County of Ada)

JEFFREY L. CHANDLER, D.P.M., being first duly sworn upon oath, deposes
and says:

1. That this Affidavit of Jeffrey L. Chandler, D.P.M. is submitted in support of Plaintiff's Opposition to Defendants Stacie Peabody and Fingerprints Day Spa's Motion for Summary Judgment.

2. That Affiant is a practicing board certified podiatrist.

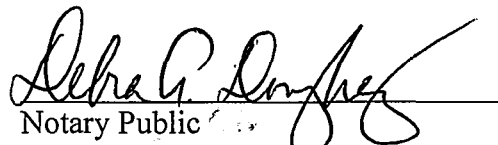
3. That attached hereto is Exhibit A, a true and correct copy of my opinion letter dated May 8, 2013, which contains information as to my qualifications as an expert and my opinions expressed in this action pursuant to Idaho Rules of Evidence 702-705 and as disclosed pursuant to Idaho Rules of Civil Procedure 26(b)(4).

FURTHER, your Affiant sayeth naught.


Jeffrey M. Chandler, D.P.M.

SUBSCRIBED AND SWORN to before me this 22nd day of May, 2013.




Notary Public
Residing at Eagle, Idaho
My Commission expires: 10-22-16

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of July, 2013, a true and correct copy of the foregoing was served upon the follow attorneys of record via method below:

David W. Knotts; Tracy L. Wright
Carey Perkins, LLP
Capitol Park Plaza
300 N. 6th Street, Ste. 200
P. O. Box 519
Boise, ID 83701

*Attorneys for Defendant, Stacie Peabody
and Fingerprints Day Spa*

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dwknotts@careyperkins.com
tlwright@careyperkins.com

Jeffrey P. Heineman
Heineman Law Office


1501 Tyrell Lane
Boise, ID 83706
Attorney for Defendant, Linda Cook

☒ U.S. Mail, postage prepaid
☐ Hand-Delivered
☐ Overnight Mail
☐ Facsimile (208) 947-9009
☒ Email: jeff@heinemanlaw.com

Margalit Z. Ryan
Bauer & French

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Attorney for Defendant, Linda Cook

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☐ Overnight Mail
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mryan@bauerandfrench.com


James F. Jacobson

Fellow American College of Foot Surgeons
Diplomat American Board of Podiatric Surgery
Member American Podiatric Medical Association

JEFFREY L. CHANDLER, D.P.M., P.A.

Ankle & Foot Center

May 8, 2013

Regarding Tracy Sales

1. What is the nature and extent of your diagnosis with respect to any injuries or conditions pertaining to Tracy Sales' foot post April 19, 2010?

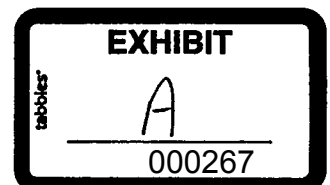
I first saw Ms. Tracy Sales on December 27, 2010 with a chief complaint of ongoing pain, swelling and erythema of her right toe. Ms. Sales stated she had a pedicure in April 2010 and "it has gone downhill from there." Ms. Sales stated she has seen a physician for this problem; was placed on antibiotics and a pick-line. We performed a history exam with X-Rays, and it was thought Ms. Sales may have had an ingrown toe nail stemming from the April 2010 pedicure.

At this time, we decided to excise the right lateral border under local anesthesia. We placed the local anesthetic block and proceeded to excise the lateral border. Phenol (Carbolic Acid) was used to kill the root and avulsion of nail was performed to ensure infection was not staying underneath the nail. The foot was dressed with dry sterile dressing after Neosporin and a betadine adaptec was applied to the nail bed and instructions to soak as directed. Ms. Sales was to return for follow-up care at a later date.

On December 28th, 2010, Ms. Sales called complaining she was unable to soak her foot due to the pain. She was seen in office and the right toe looked as if there was a decrease in redness and swelling.

On January 3, 2011, Ms. Sales was seen for routine follow-Up care. She stated that it appears to be healing and then flairs up again. It was noted that redness and swelling had decreased.

Ms. Sales was seen in office on January 17, 2011 for a pre-operative appointment. Per the history and physical, Ms. Sales had a nail trim, polishing and pedicure at a salon and from there "it all went downhill." She was seen by another physician and placed on antibiotics as well as a PICC line with no resolution. A partial matrixectomy was performed on December 27, 2010 using phenol. In doing the Phenolization, a sac of fluid was eventually extruded from the wound and as of this date, the matrixectomy appears to be healing okay, but



Fellow American College of Foot Surgeons
Diplomatic American Board of Podiatric Surgery
Member American Podiatric Medical Association

JEFFREY L. CHANDLER, D.P.M., P.A.

Ankle & Foot Center

the joint still appears to be inflamed, and a decision to take a bone scan to check for a "hot spot" was made.

The decision to open the joint, clean it out and culture it in surgery was made to ensure there was no osteomyelitis.

Ms. Sales was brought to the OR in satisfactory condition and placed on the OR table in the supine position under local anesthetic. The right foot was prepped, draped and lowered into the sterile field. A Penrose drain was used to prevent bleeding and then an incision was made across the dorsal aspect of the IPJ. The incision was deepened through sharp and blunt dissection. The bleeders were clamped and tied and an incision was carried down into the capsule. The capsule was opened. There was not much fluid in the capsule. In the joint, however, was fluid that was sent for culture. It appeared to be clean. We suspected because she has a history of psoriasis that this is probably a psoriatic arthritic joint. We inspected the joint and there appeared to be no apparent damage done, just minor inflammation of the toe. The wound was irrigated and then closed with 4-0 Vicryl across the joint and across the tendon to recoat the extensor tendon x 2 and then the skin was closed with 4-0 Prolene. We placed some Depo-Medrol into the joint for anti-inflammatory. She was put on Cipro 750mg at this time.

Ms. Sales was seen on January 20th, 2011 for a bandage change and the edema seemed to be subsiding. She was then seen on February 1st to have sutures removed and to then be seen in another month. On the 28th of February she returned to the office with concerns that her toe was still swollen and red. It appeared she was still having an arthritic process and was given Fildene 20mg. At this time we decided to look for mycobacteria.

On March 14th we did a local anesthetic and biopsied a tissue to send to St. Luke's. The results indicated there was no fungus or yeast isolated.

In answer to the question, I felt that at first it might be an ingrown toe nail; then thought might be psoriatic arthritis. However as this continued to be on going and no other lesions or psoriatic joint processes in any other place in her body except where the toe had been worked on by this salon in April of 2010, we determined that it was a mycobacterial infection that was a result from the incident Tracy Sales had at the Salon.

Fellow American College of Foot Surgeons
Diplomate American Board of Podiatric Surgery
Member American Podiatric Medical Association

JEFFREY L. CHANDLER, D.P.M., P.A.

Ankle & Foot Center

2. Is there a causal relationship between the injuries or conditions set forth in your answer above and the incident of April 19, 2010, incident involving Tracy Sales, Stacie Peabody dba Finger Prints Day Spa, and Linda Cook? If so, upon what do you base your opinion?

I do believe there is a causal relationship between the injuries Ms. Sales sustained and the treatment she received as a result to the incident at the salon in April 2010. She never has any joint inflammation or lesions anywhere on her body up to this point, and after the incident that occurred on April 2010 is when she began to experience these problems.

3. Has the treatment Tracy Sales received for her incident-related injuries proximately resulting for the April 19, 2010, incident been reasonable and necessary?

Yes, in my medical opinion I believe she has received treatment for her incident related injuries that has been both reasonable and necessary.

4. Are the costs for the treatment Ms. Sales has received for her incident-related injuries proximately resulting for April 19, 2010 incident reasonable and in accordance with rates charged in your profession for similar services?

Yes, I am a board certified member of American Medical Podiatric Association, Idaho Podiatric Medical Association, and am providers for Blue Cross and Blue Shield and most other insurance related companies, and I am within the cost of most other doctors in my profession.

5. What is your prognosis with respect to Tracy sales' foot injuries and/or conditions?

Note that we did go on to find osteomyelitis in her foot after doing an MRI. The bone scan was positive and then the MRI was done and was positive. We had to go in and removed a portion of the joint of the bone and sent that tissue in and they were never able to isolate what the infectious process was. We determined once again that it was mycobacteria.

6. What is the nature and extent of any incident-related limitations, restrictions, or impairments, as well as applicable dates or time periods of such limitations, restrictions, or impairments as it pertains to Tracy Sales?

Fellow American College of Foot Surgeons
Diplomate American Board of Podiatric Surgery
Member American Podiatric Medical Association

JEFFREY L. CHANDLER, D.P.M., P.A.

Ankle & Foot Center

We explained to Ms. Sales that if this continues we might need to fuse her joint to eliminate the infectious process by cutting out the infected joint and then fusing it together, however, after her surgery in which we removed a portion of the joint, the infectious process appears to have subsided. She does still occasionally have some pain with her toe but not to the extent it was prior to the intervention and removing that portion of that joint.

7. What additional treatments, if any, do you recommend for Tracy Sales at this time?

It was explained to her we could fuse the joint, but the fusion was not necessary if the pain was not significant to need such treatment.

8. What is the nature, extent, and reasonable cost estimate of any future medical treatment and/or procedures that Tracy Sales will need as a proximate result of her incident-related injuries sustained because the April 19, 2010, incident?

If she has to have a fusion of the Inter Phalangeal Joint (IPJ) the cost for code 28760 for the doctors' fees would be \$1,604.00 and for the surgery center would be \$1,734.00; hardware would be between \$200-\$400.

9. Any other observations or medical opinions that may have related to the injuries, medical complaints, limitations, on-going impairments, and future medical treatment Tracy Sales has received or will receive for her incident-related injuries proximately resulting from the April 19, 2010, incident?

Not at this time.

10. What documentation have you reviewed in formulating your opinions and responses to the above questions?

In addition to copies of the bone scan, MRI, x-rays, pertinent medical records and billing were all reviewed.

11. What are your credentials, licenses, specialties, and professional associations or attainments?

I graduated from medical school in 1974 in San Francisco and did my residency at Beach Community Hospital. I taught 3 years at UCUA Medical Center. I was board certified in 1980 from the American Board of Podiatric Surgery, also received my Ankle and Foot Medical Board of Podiatric Surgery, was a National Honor Society Member, and in the top 5 in class in medical school.

Fellow American College of Foot Surgeons
Diplomate American Board of Podiatric Surgery
Member American Podiatric Medical Association

JEFFREY L. CHANDLER, D.P.M., P.A.

Ankle & Foot Center

12. What professional publications, articles, or other similar writings have you authored or co-authored within that last ten years?

I have not written and articles.

13. What is your compensation for providing your expert opinions in this action?

Approx. \$500.00, if we have to go to court it will be more than that.



Jeffrey Chandler

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JUL 02 2013

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Attorneys for Linda Cook

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRACY SALES, individually, Plaintiff, vs. STACIE PEABODY, individually and doing business under the assumed name of FINGERPRINTS DAY SPA; and LINDA COOK, individually, Defendants.	Case No. CV PI 1206516 AFFIDAVIT OF LINDA COOK
---	---

STATE OF IDAHO)
) ss:
County of Ada)

LINDA COOK, being first duly sworn deposes and says upon oath:

1. That I am competent to testify as to the matters contained herein.
2. That I worked at the business Stacie Peabody owned, commonly known as Finger

Prints Day Spa, for the period of July 2007 to March 2011. I never signed a written contract of any kind with Stacie Peabody.

3. Stacie Peabody did not employ a receptionist in relation to the Finger Prints Day Spa, and required that everyone at the business answer the telephone, regardless of who the telephone call was for and whether or not it required that person to interrupt what they were doing to answer it.
4. During the 2011 Christmas season, Stacie Peabody entered into a coupon agreement in connection with her business, Finger Prints Day Spa, with a coupon distributor. Stacie Peabody also sold some of the coupons herself and kept that money. I told Stacie Peabody ahead of time that I did not want to participate in the Coupon promotion. However, after the coupons were out, I was made to feel that I had to provide some of the free services to avoid damaging the salon's reputations, which would have hurt my business.
5. I did not have a written lease agreement. However, it was my understanding that I was responsible for cleaning and maintaining my own nail stations and tools/implements, and Stacie Peabody was responsible for cleaning and maintaining the Finger Prints salon and all the shared areas including the foot basins and tubs.
6. There were two foot basins at the salon, and their use was shared by all the workers in the salon, including Stacie Peabody. Although I understood it to be Stacie's responsibility to clean and disinfect the foot basins, I cleaned the foot basin I used.
7. In 2008, Stacie Peabody also increased our leases by \$10.00 per month to hire someone to clean the work stations. During the Spring of 2010, Stacie Peabody was not in the salon as often due to surgery on her shoulder. I am not sure who cleaning salon during that time-- she hired someone (who quit) for a portion of that time.

FURTHER, your Affiant sayeth naught.

DATED this 29th day of April, 2013.



SUBSCRIBED AND SWORN

to be true in this

Linda Cook

Linda Cook

29th day of April, 2013.

Heather Daniels

Notary Public for Idaho

Residing at Boise, ID

Commission expires 12/20/18

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of July, 2013, a true and correct copy of the foregoing was served upon the follow attorneys of record via method below:

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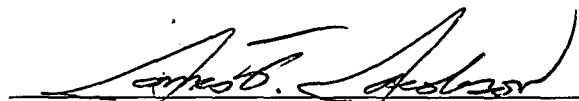
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A.M. _____ P.M. 470

JUL 02 2013

CHRISTOPHER D. RICH, Clerk
By CHELSIE PINKSTON
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL

DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRACY SALES, individually;

Plaintiff,

vs.

STACIE PEABODY, individually and doing
business under the assumed name of
FINGERPRINTS DAY SPA; and LINDA
COOK, individually;

Defendants.

Case No. CV PI 1206516

**PLAINTIFF'S MEMORANDUM IN
OPPOSITION TO DEFENDANT'S
SECOND MOTION FOR SUMMARY
JUDGMENT AND MOTION TO
STRIKE**

COMES NOW the above-named Plaintiff, Tracy Sales, by and through her counsel of record, Jacobson & Jacobson, PLLC, and hereby submits Plaintiff's Memorandum in Opposition to Defendant's Second Motion for Summary Judgment and Motion to Strike. This Memorandum is supported by the Affidavit of James F. Jacobson in Opposition to Defendant's Second Motion for Summary Judgment and Motion to Strike, the Affidavit of Doug Schoon, the Affidavit of Jeffrey L. Chandler, D.P.M., and the Affidavit of Linda Cook.

I.

INTRODUCTION

Defendants Peabody and Fingerprints Day Spa¹ (“Defendants”) have again moved this Court for summary judgment, based this time on Plaintiff’s claim of direct negligence against Defendants. While the tenor of Defendants’ argument is at times aggressive and caustic, it nevertheless lacks substance and fails to demonstrate as a matter of law that Defendants are entitled to summary judgment.

Plaintiff has set forth genuine issues of material fact showing Defendants breached their duty of care to Plaintiff, which breach caused Plaintiff damage. Mr. Schoon is competent to testify as to the matters contained in his affidavit, and Dr. Chandler’s is the only testimony in the record regarding causation. Defendants have put forward no basis in law or fact upon which they are entitled to summary judgment.

Thus, summary judgment is inappropriate as to Plaintiff’s claim of negligence against Defendants. Plaintiff will not provide an additional statement of facts in this briefing, as one was previously provided to the Court in relation to Defendants’ prior summary judgment motion. Plaintiff will make salient references to the record in the argument set forth below, and Plaintiff has resubmitted supporting affidavits for the convenience of the Court. References to the record are based on the current affidavits submitted.

¹ Fingerprints Day Spa is only an assumed business name and has no legal or juridical personality. Stacie Peabody is personally liable for those actions and omissions pertaining to her business known as Fingerprints Day Spa.

II.

SUMMARY JUDGMENT STANDARDS

On a motion for summary judgment “[a]ll disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party.” *Purdy v. Farmers Ins. Co. of Idaho*, 138 Idaho 443, 65 P.3d 184, 186 (2003), citing, *Infanger v. City of Salmon*, 137 Idaho 45, 44 P.3d 1100 (2002). If the record contains any conflicting inferences upon which reasonable minds might reach different conclusions, summary judgment must be denied. *McCoy v. Lyons*, 120 Idaho 765, 769, 820 P.2d 360, 364 (1991). Summary judgment is inappropriate “if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there” are genuine issues relating to material facts in the case. *See Id.*

III.

ARGUMENT

Plaintiff has offered the expert opinions of Doug Schoon in demonstrating Defendants’ liability in this action, and Mr. Schoon is one of the foremost experts in the United States with respect to the beauty and cosmetology industries. Defendants do not have an expert witness to respond to Mr. Schoon, but rather assert various bases for the conclusion that Mr. Schoon’s opinions do not aid the trier of fact in this action. Defendants’ arguments are in error and are not grounds for granting summary judgment as to Plaintiff’s claim or granting Defendants’ motion to strike.

Defendants spend much effort in discussing the impact of I.C. §54-824A and IDAPA 24.04.01.800 on Mr. Schoon’s opinions. In doing so, Defendants attempt to

insert elements into that statute and regulation that do not exist. I.C. §54-824A states, in full, the following:

(1) Except as otherwise provided in subsection (2) of this section, all instruments used by persons licensed pursuant to this chapter shall, after cleaning and prior to use on each patron, be disinfected with a disinfecting agent registered by the U.S. environmental protection agency as hospital grade or better.

(2) Nail instruments shall be sanitized in accordance with manufacturers' standards.

(3) Every precaution shall be taken by persons licensed pursuant to this chapter to prevent the transfer of disease causing pathogens from person to person.

Significantly, the affirmative requirements of the statute are in the passive voice, which is to say that the actor is unidentified. The statute does not specify who is to take the action required pursuant to it. The actor under the statute is identified in the administrative regulations promulgated and enforced by the Bureau of Occupational Licenses and the Idaho Board of Cosmetology, which require that facilities such as Defendants' facility be under the direct supervision of a licensed operator. IDAPA 24.04.01.800 (12). Those same regulations place requirements on the licensed operator to ensure that the facility is properly cleaned and sanitized. *Id.*

Defendants are the licensed operators and self-identified owners of the facility. (Jacobson Affidavit; Exhibit A, p. 7, ll. 6-21). They are the owners of the pedicure station and foot basin in which Plaintiff was injured. (Jacobson Affidavit; Exhibit A, p. 14, ll. 5-11). They bear the responsibility of ensuring that the facility's equipment, including the foot basins, were properly cleaned, sanitized, and disinfected. (Schoon Affidavit; Exhibit A, p. 3-4). Further, Defendants were the only persons inspected by the

Bureau of Occupational Licenses, and no other person or entity was inspected by the Bureau. (Jacobson Affidavit; Exhibit B).

Those who worked in the Fingerprints Day Spa facility, including Linda Cook, understood that it was Defendants' responsibility to clean and disinfect the pedicure stations, including the foot basins. (Cook Affidavit,² ¶ 5-6). In fact, Defendants at one point specifically hired someone to clean the facility, including the pedicure stations and their attendant foot basins. (Cook Affidavit, ¶ 7).

Thus, Defendants had a legal duty to maintain, clean, sanitize, and disinfect the pedicure station and foot basin in which Plaintiff was injured. Defendants do not dispute that they had a legal duty of ordinary care to Plaintiff. (See Memorandum in Support of Defendants Stacie Peabody and Fingerprints Day Spa's Motion to Strike the Disclosure of Doug Schoon, and for Summary Judgment Re: Count I – Negligence, p. 10). The general duty of care, I.C. §54-824A, and the IDAPA regulation and facts in the record affirm that duty on the part of Defendants. IDJI 2.00.1, IDJI 2.22, *Ahles v. Tabor*, 136 Idaho 393, 395, 34 P.3d 1076 (2001); *O'Guin v. Bingham County*, 142 Idaho 49, 122 P.3d 308 (2005); *Sanchez v. Galey*, 112 Idaho 609, 617, 733 P.2d 1234 (1986).

Additionally, Defendants have maintained that they were the landlords of the premises on which Plaintiff was injured. (Peabody Affidavit, ¶ 1); (Cook Affidavit, ¶ 1). The duty of the land owner to the person injured on the land turns on the status of the injured person. *See Peterson v. Romine*, 131 Idaho 537, 540, 960 P.2d 1266 (1998). Defendants owed Plaintiff a duty as an invitee. An invitee is one who enters upon the premises of another for a purpose connected with the business conducted on the land, or

² Two Affidavits from Linda Cook have been submitted in relation to Defendants' summary judgment motion. One was submitted by Plaintiff and the other submitted by Defendants. Unless specifically marked by footnote, any reference in this brief to "Cook Affidavit" is to the Affidavit of Linda Cook submitted by Plaintiff in opposition to Defendants' summary judgment motion.

where it can reasonably be said that the visit may confer a business, commercial, monetary or other tangible benefit to the landowner. *Id.*

A landowner's duty to an invitee is that of ordinary care under all the circumstances, which means to avoid exposing invitees to an unreasonable risk of harm, which duty extends to all portions of the premises to which an invitee may reasonably be expected to go. *See* IDJI 3.03 and 3.09; *Walton v. Potlach Corp.*, 116 Idaho 892, 781 P.2d 229 (1989). Where the owner of the premises takes some action, through its method or manner of conducting business, then that owner is responsible for its negligence in injuring an invitee, without regard to whether the owner had constructive notice of the dangerous condition. *McDonald v. Safeway Stores, Inc.*, 109 Idaho 305, 308, 707 P.2d 416 (1985).

As the owner of the premises, Defendants had a duty to exercise ordinary care in the maintenance and cleaning of their facility and to avoid exposing Plaintiff, as an invitee, to an unreasonable risk of harm. Defendants state that only Linda Cook owed Plaintiff a duty as an invitee, but the above law states otherwise.

Contrary to Defendants' assertion, Mr. Schoon's testimony is not whether Defendants had a legal duty to Plaintiff, but whether Defendants' breached that duty. Mr. Schoon's opinions are that Defendants' conduct in maintaining, cleaning, sanitizing, and disinfecting their facility was below the applicable standard of care. Mr. Schoon's opinion is that Defendants improperly used the Let's Touch® product, specifically, "The products label does not recommend or provide usage instructions for any type of pedicure tubs and constitutes misuse for Stacie Peabody to use Let's Touch in the fashion she's claimed in her deposition." (Schoon Affidavit; Exhibit A). This is no sly insinuation, and Defendants plainly admit that the labeling does not even mention foot basins.

The only effort Defendants made to sanitize and disinfect the foot basins at the facility was to run the Let's Touch® product through the jets in the foot basins, which was done only in relation to the clients Stacie Peabody serviced. (Jacobson Affidavit; Exhibit A, p. 29, ll. 11-22). This use of the Let's Touch® product was improper and in violation of federal law. (Schoon Affidavit; Exhibit A). Defendants were given ample opportunity in deposition to state everything done by them to maintain and clean the facility. If there were more facts to be known, Defendants' counsel could have elicited them in the deposition or submitted additional affidavits. Defendants have not done so. Such an argument has no place in Defendants' summary judgment motion.

Defendants maintain that they had no such responsibility to maintain, care for, and clean the facility. (Jacobson Affidavit; Exhibit A, p. 15, ll. 11-15). Defendants have no knowledge as to what others were doing in sanitizing and disinfecting the facility, at the time of Plaintiff's injury or otherwise. (Jacobson Affidavit; Exhibit A, p. 28, ll. 6-9). Defendants were negligent in completely abdicating their responsibility to ensure the facility's equipment was properly cleaned and disinfected.

Defendants state that they relied upon inspections from the Bureau of Occupational Licenses to determine whether their facility was being properly cleaned, sanitized, and disinfected. (Jacobson Affidavit; Exhibit A, p. 31, ll. 5-18, p. 33, ll. 14-18). This abdication of responsibility by Defendants was unreasonable. (Schoon Affidavit; Exhibit A, p. 3-4).

Q. And, again, it's your testimony that you don't have any idea what the other technicians did with respect to cleansing or sanitizing equipment or these stations?

A. No. I basically relied on the Bureau of Occupational Licenses to do their job and inspect each business owner and give their inspection results. Everyone had their own stations. They had their license at their stations.

The State came in and inspected everyone yearly, sometimes twice a year. (Jacobson Affidavit; Exhibit A, p. 31, ll. 5-15).

Contrary to Defendants' testimony, the Bureau inspected Defendants' facility, for which she was the licensed operator, only once every two years. (Jacobson Affidavit; Exhibit B). Both in 2009 and in 2011, the Bureau's investigation found problems with the instrument sanitization at Defendants' facility. *Id.*

Further, Defendants were away from the facility for an extended period of three to four months straight during the spring of 2010, the time during which Plaintiff was injured. (Cook Affidavit, ¶ 7); (Jacobson Affidavit; Exhibit A, p. 18, ll. 10-13). While Defendants made some arrangement for the cleaning of the facility for a brief period during that spring, there is no evidence that Defendants even provided for any type of regular cleaning and disinfecting of the facility during that spring. (Cook Affidavit, ¶ 7).

All of the above facts show that a genuine issue of material fact exists as to whether Defendants breached their applicable duty of care. The issue of breach in a negligence cause of action generally is not a question of law, but one of fact reserved for the trier of fact. *Fuller v. Studer*, 122 Idaho 251, 253, 833 P.2d 109 (1992). Because multiple factual issues exist with respect to Defendants' negligence, summary judgment as to Plaintiff's negligence claim would be improper based on an argument that no breach of the applicable standard of care occurred.

Defendants argue that Mr. Schoon cannot provide expert opinion as to the causation of Plaintiff's injuries because he is not a medical doctor. Mr. Schoon does not purport to provide such expert testimony. However, Dr. Jeffrey Chandler provides expert testimony as a medical doctor as to the causation of Plaintiff's injuries. Defendants' failures, inaction, and abdication of responsibility for the proper cleaning, maintenance,

sanitizing, and disinfecting of their facility, including the pedicure stations and foot basins, caused Plaintiff's injuries. (Chandler Affidavit; Exhibit A). Defendants' negligence caused Plaintiff to suffer a mycobacterial infection that resulted in severe injury and multiple surgical procedures. *Id.*

Defendants argue that this causal link is pure speculation. Unfortunately for Defendants, there are no facts in the record to support their bare assertion. The only facts in the record are the opinions of Dr. Chandler regarding causation. Thus, the only pure speculation is on the part of Defendants, who offer nothing more than bare, unsupported argument with respect to causation. It is also unfortunate that Defendants' counsel has attempted to testify as to the nature and effect of Plaintiff's medical records by including them as exhibits to his affidavit. Defendants' counsel is not competent to so testify, which is the basis for Plaintiff's motion to strike. The Court should not consider Plaintiff's medical records submitted by Defendants' counsel for purposes of this summary judgment motion.

No reported Idaho case addresses injuries suffered in a salon/spa facility similar to those of Plaintiff. However, the Louisiana case of *DeTraz v. Lee d/b/a Virgin Nails*, 900 So.2d 1099 (La.App. 3 Cir. 2005), is illustrative of these types of injury cases. Michelle DeTraz was injured when she received a pedicure from the defendant on September 23, 2002. Earlier that day Ms. DeTraz had cut her leg while shaving. The part of her leg that she cut was immersed in a tub at defendant's establishment. Just a few days after the pedicure, Ms. DeTraz noticed a red bump in the area where she cut her leg. The symptoms became progressively worse until Ms. DeTraz sought medical treatment a month after her pedicure. Ms. DeTraz was able to prove that the defendant had not properly cleaned the tubs in the establishment. The Louisiana Court of Appeals, applying

the *Housley* presumption, held that Ms. DeTraz met the burden of proof on causation and awarded damages. The *Housley* presumption derives from the Louisiana Supreme Court case *Housley v. Cerise*, 579 So.2d 973 (La.1991), in which the court determined:

A claimant's disability is presumed to have resulted from an accident, if before the accident the injured person was in good health, but commencing with the accident the symptoms of the disabling condition appear and continuously manifest themselves afterwards, providing that the medical evidence shows there to be a reasonable possibility of causal connection between the accident and the disabling condition.

Plaintiff's claim mirrors the *DeTraz* case in many respects other than the event that created the opening for the bacteria occurred at Defendants' establishment. While Idaho has not adopted a causal presumption in these cases, Dr. Chandler's opinions set forth his opinion as to causation and the basis for it.

Plaintiff has met her burden of demonstrating that genuine issues of material fact exist as to her negligence claim against Defendants.


IV.

CONCLUSION

Plaintiff respectfully requests this Court deny Defendants' summary judgment motion and motion to strike.

DATED this 2nd day of July, 2013.

JACOBSON & JACOBSON, PLLC

By: 
James F. Jacobson
Attorney for Plaintiff

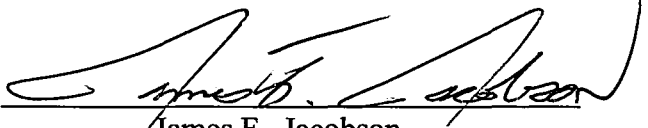
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of July, 2013, a true and correct copy of the foregoing was served upon the follow attorneys of record via method below:

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DEPUTY

ORIGINAL

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
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TRACY SALES, individually,

Plaintiff,

vs.

STACIE PEABODY, individually and
doing business under the assumed name
of FINGERPRINTS DAY SPA; and
LINDA COOK, individually,

Defendants.

Case No. CV PI 1206516

DEFENDANTS' REPLY
MEMORANDUM RE: MOTION TO
STRIKE AND MOTION FOR
SUMMARY JUDGMENT, AND
RESPONSE TO PLAINTIFF'S
MOTION TO STRIKE

I. INTRODUCTION

Plaintiff has not established that Defendants Stacie Peabody and Fingerprints Day Spa (hereinafter referred to collectively as "Ms. Peabody") owed her anything more than a general duty of ordinary care under the circumstances. Further, notwithstanding Plaintiff's erroneous construction of the facts, the record before the Court demonstrates

DEFENDANT'S REPLY MEMORANDUM RE: MOTION TO STRIKE AND MOTION FOR
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that Ms. Peabody complied fully with said duty, and the inadmissible and irrelevant opinion of Doug Schoon provides no evidence to the contrary. Therefore, Plaintiff has not provided evidence of breach to support her claim, and summary judgment for Ms. Peabody is appropriate on this basis.

In the alternative, Plaintiff has not (and cannot) provide admissible evidence of causation in this matter. That is, Plaintiff's causation theory amounts to pure speculation, and her causation expert, Dr. Jeffrey Chandler, reflects that in his Opinion Letter. As such, Dr. Chandler's "opinion" regarding causation does not provide the evidence Plaintiff needs to overcome summary judgment on the causation element of her claim, and summary judgment for Ms. Peabody is appropriate on this additional basis.

Finally, Plaintiff has not put forth any meaningful argument in support of her Motion to Strike. Nor has she cited any case law in support of said argument. Accordingly, Plaintiff's Motion should be denied.

II. ARGUMENT

A. Plaintiff Has Not Put Forth Admissible Evidence of Breach by Ms. Peabody

1. I.C. 54-824A and IDAPA 24.04.01.800(12) do not impose a duty upon Ms. Peabody to ensure sanitation of equipment used by a lessee.

Plaintiff attempts to read into the applicable Idaho Code and administrative regulations a duty by Ms. Peabody to ensure the sanitation of the instruments and equipment used by the independent contractors leasing space in her spa. Plaintiff specifically points to I.C. 54-824A and IDAPA 24.04.01.800(12) to infer that because cosmetology shops "must be licensed and under the direct supervision of a licensed

operator,” Ms. Peabody owed an absolute duty to ensure the sanitation of Ms. Cook’s equipment. In doing so, Plaintiff ignores other language in both the Idaho Code and the applicable IDAPA regulations that points directly to the equipment operator as bearing the responsibility to clean and sanitize her own equipment prior to each use on a patron. See IDAPA 24.04.01.800.03—.04; see also I.C. 54-824A (“all instruments used by persons licensed pursuant to this chapter shall, after cleaning and prior to use on each patron, be disinfected....”). It is undisputed that Ms. Cook was a licensed cosmetician and was the equipment operator at the time of Plaintiff’s pedicure. Therefore, under I.C. 54-824A and IDAPA 24.04.01.800, it was Ms. Cook, not Ms. Peabody, who was responsible for ensuring the foot basin was cleaned and sanitized before Ms. Cook used it in conjunction with the subject pedicure on her client.

Additionally, Plaintiff’s tortured reading of these laws and regulations makes sense only when one assumes the shop owner has the ability to control the lessee; Plaintiff’s argument is an attempt to back-door in her already-defeated theory of *respondeat superior*. This Court has specifically found that no set of facts exist in this case under which Ms. Cook possibly could have been Ms. Peabody’s agent or employee. (Order Granting Defendants’ Motion for Summary Judgment on Count II of the Complaint, pg. 4). Ms. Peabody therefore cannot be held vicariously liable for Ms. Cook’s actions under this theory. Given Ms. Peabody’s inability to control Ms. Cook in cleaning or sanitizing Ms. Cook’s equipment prior to use on a patron, it would be incongruous with the applicable law (and with this Court’s prior ruling) to find that Ms. Peabody had any duty to supervise such activities.

Further, in failing to offer any kind of response to the Defendant's argument that OSHA regulations are inapplicable to the present situation, Plaintiff has conceded that such regulations do not apply under the facts of this case. To reiterate, however, the law is clear that OSHA regulations may only be used to establish negligence *per se* in cases where the plaintiff is a member of the class of persons the regulations were designed to protect. ***Walton v. Potlatch Corp.***, 116 Idaho 892, 781 P.2d 229 (1989). In the present case, the OSHA regulations mentioned by Mr. Schoon apply only to employers and employees, not to independent contractors. Given Ms. Cook's undisputed status as an independent contractor and not as an employee, such regulations are inapplicable.

2. Plaintiff makes questionable assertions of fact in this case in an attempt to create the appearance of a question of fact.

In an attempt to create the appearance of a question of fact solely for the purpose of surviving summary judgment, Plaintiff also makes several incorrect and/or misleading assertions of fact in her response brief: (1) that it was strictly Ms. Peabody and her spa that were the subject of inspections by the Bureau of Occupational Licenses, and not the individual lessees; (2) that the Bureau found problems with Ms. Peabody's spa; and, (3) Ms. Cook's understanding that it was Ms. Peabody's responsibility to clean and disinfect pedicure foot basins somehow created a duty by Ms. Peabody to ensure the foot basin's sanitation. Plaintiff also massages the facts of this case in such a way that she attempts to have the Court believe that Ms. Peabody had taken up the habit of hiring someone to clean the pedicure stations and their attendant foot basins, thus creating a duty to ensure the sanitation of both. (Plaintiff's Memorandum in Opposition to Defendant's Second Motion for Summary Judgment, pgs. 4—5, hereinafter "Plaintiff's Memorandum").

To begin addressing Plaintiff's erroneous characterizations of fact: first, it defies credulity for Plaintiff to claim that only Fingerprints Day Spa was inspected by the Bureau of Occupational Licensing. The Bureau did inspect Ms. Peabody's business; however, there is no denying it also inspected the business of each individual licensee that operated out of Fingerprints Day Spa. (Aff. of James F. Jacobson, Exhibit A, Dep. Stacie Peabody 30:17-21 (March 27, 2013)). Perhaps Plaintiff arrives at her assumption that the individual lessees were never inspected due to the fact that she only requested records from the Bureau related to Ms. Peabody and Fingerprints, and not records related to the other businesses owned by the licensees, specifically including Ms. Cook. (See Aff. James F. Jacobson, Exhibit B, Subp. Duces Tecum, pg. 2). Furthermore, it is entirely irrelevant whether the individual lessees were inspected by the Bureau. Even if Plaintiff's statement were true, and only the spa as a whole was inspected, the record indicates the spa passed all such inspections with flying colors. (See below).

Second, Plaintiff's assertion that the Bureau found problems with Ms. Peabody's spa also is in error. For example, in the 2009 and 2011 Records of Inspection to which Plaintiff refers, the Bureau gave Ms. Peabody scores of 95 and 93, respectively, which the Bureau rates as an "A" classification. (Aff. James F. Jacobson, Exhibit B, Inspections of Fingerprints, CS-6091 2008 - Present). Far from being an indication of any "problems" with the spa, those records demonstrate Ms. Peabody's exceptional commitment to complying with the applicable rules and regulations.

Third, with respect to Plaintiff's assertion that because Ms. Cook "understood" Ms. Peabody sanitized the foot basins, Ms. Peabody therefore had a duty to clean them—that assertion is entirely off-base. While it is possible to assume a duty where none

existed before, liability for such assumption can only come into being to the extent that there is in fact an undertaking. ***Udy v. Custer County***, 136 Idaho 386, 34 P.3d 1069 (2001). In other words, absent an agreement by Ms. Peabody to sanitize the foot basins for Ms. Cook prior to each and every pedicure, Ms. Peabody had no duty to sanitize the foot basin in preparation for Plaintiff's pedicure. The record contains no evidence that Ms. Peabody ever agreed to do such work for Ms. Cook's own, personal, independent customers, particularly on the date of Plaintiff's pedicure.

Further, Plaintiff's attempt to create the appearance that Ms. Peabody assumed a duty to clean the foot basins on the date of Plaintiff's pedicure by once hiring someone to clean the work stations is patently misleading. Plaintiff points in her brief to Ms. Cook's statement that in 2008, Ms. Peabody increased her lease rates by \$10.00/month to hire someone to clean the work stations. (Plaintiff's Memorandum, pg. 5). Even if true, this fact is far from enough to establish that Ms. Peabody assumed the duty to clean the foot basin in preparation for Plaintiff's pedicure on April 19, 2010. Ms. Peabody concedes she owned the pedicure stations and attendant foot basins; however, lessees such as Ms. Cook had the right to use them under their lease agreements, Idaho Code and IDAPA. Ms. Cook states in her affidavit that she did in fact clean the foot basins she used, and was not sure who was responsible for cleaning the salon at the time of Plaintiff's pedicure. (Aff. James F. Jacobson, Ex. B, Aff. Linda Cook, ¶¶ 6). Ms. Cook further states she never once signed any kind of written contract with Ms. Peabody for her lease (or with respect to any delegation of sanitation duties). (Aff. James F. Jacobson, Ex. B, Aff. of Cook, ¶¶ 2 and 5). In the absence of an express agreement between the parties (and, there is no dispute there was no such express agreement), the duty to clean the foot

basins falls on the party using the foot basins. See I.C. 54-824A and IDAPA 24.04.01.800.

At the time of the subject pedicure, that was Ms. Cook.

In addition, although a person can assume a duty to act on a particular occasion, the duty is limited to the discrete episode in which the aid is rendered. Past volunteer acts do not entitle the benefited party to expect assistance on future occasions, at least in the absence of an express promise that future assistance will be forthcoming. **Custer County**, 136 Idaho at 389—90, 34 P.3d at 1072—73. In fact, Ms. Cook admits she did not rely on Ms. Peabody to clean the foot basins: she cleaned the foot basins she used, herself. (Aff. James F. Jacobson, Ex. B, Aff. Linda Cook, ¶ 6). Again, any claim by Plaintiff that Ms. Peabody was responsible for cleaning the foot basin prior to Plaintiff's pedicure is in contravention of I.C. 54-824A, IDAPA 24.04.01.800, and is not supported by the facts. The fact that Ms. Peabody may have hired somebody to clean the work stations two years prior the Plaintiff's pedicure is entirely too remote in time to have any bearing on this case. See **Roeh v. Roeh**, 113 Idaho 557, 746 P2d. 1016 (Idaho App. 1987) (discussing irrelevance of past behavior, as too remote in time). By looking at all of Ms. Cook's statements rather than selecting one to create an appearance of a factual issue, as Plaintiff does, it is clear that there is no evidence that could possibly show Ms. Peabody assumed any duty to clean the foot basin used for Plaintiff's pedicure at the time of Plaintiff's pedicure. Once more, this Court has found, "Cook had full control over her sanitation procedures." (Order Granting Defendants' Motion for Summary Judgment on Count II, pg. 5.). In any event, as discussed below, there is no caused nexus between any of this and the Plaintiff's alleged injury.

3. Ms. Peabody, as the owner of the subject premises, is not automatically subject to liability for injuries alleged by a lessor's invitee.

A spa owner, such as Ms. Peabody, who leases a stall to an independent contractor, such as Ms. Cook, is not, as Plaintiff contends, automatically liable for any injury that allegedly results from a lessee's acts or omissions. Plaintiff cites to several Idaho cases in a vain attempt to support her argument; however, Plaintiff has misconstrued the legal significance of those cases. For example, citing to **Walton v. Potlatch Corp.**, 116 Idaho 892, 781 P.2d 229 (1989) and **McDonald v. Safeway Stores, Inc.**, 109 Idaho 305, 707 P.2d 416 (1985), Plaintiff phrases the law to state that a landowner would be liable for any injury alleged to have occurred on her premises, regardless of whether the landowner had notice of the condition that caused the injury. That is not the state of the law in Idaho.

The **Walton** case involved an employee of an independent contractor that had been hired by the landowner, Potlatch Corporation, to perform certain work on the Landowner's pulp and paper facility. 116 Idaho 892, 781 P.2d 229. In **Walton**, the Idaho Supreme Court reversed a jury verdict in favor of the plaintiff where the trial court, through jury instructions, had incorrectly imposed duties upon the Defendant landowner. The Court found error because those duties were extracted from OSHA regulations that could apply only to the plaintiff's immediate employer, and did not apply in a landowner-independent contractor situation. **Id.**

The correct rule of law taken from **Walton** that is relevant to this case is that a landowner owes an invitee a duty to keep its premises in a reasonably safe condition and to warn of hidden or concealed dangers that the owner knows of or should have known of

by exercise of reasonable care. *Id.* at 898, 781 P.2d at 235 (emphasis added). Additionally, under an ordinary negligence standard of care, a premises owner is not automatically subject to liability for an injury to an invitee who enters upon the property. Under that standard, applicable here, the duty not to act negligently is only a duty to take reasonable precautions against risk of undue harm. *Harrison v. Taylor*, 115 Idaho 588, 596, 768 P.2d 1321, 1329 (1989).

In this case, Ms. Sales was an invitee of Ms. Cook. Plaintiff can point to no evidence to show that Ms. Peabody knew or should have known of any danger, or failed to keep her premises reasonably safe. The record is devoid of any evidence that Ms. Peabody was aware of any danger posed by the foot basin used by Ms. Cook at the time of Plaintiff's pedicure. The only evidence relating to the condition of the foot basins at Fingerprints is from the Idaho Bureau of Occupational Licensing inspections from 2007, 2009 and 2011, which demonstrated no evidence of danger from the foot basins. (Aff. James F. Jacobson, Exhibit B, Inspections of Fingerprints, CS-6091 2008 - Present). Those records do just the opposite of providing any reasonable notice of a dangerous condition: they demonstrate the spa was in immaculate condition. To go even further, even if Plaintiff were an invitee of Ms. Peabody (which she was not), there still is no evidence that Ms. Peabody knew or should have known of any dangerous condition on her premises. The Inspection Records and testimony of Ms. Peabody clearly demonstrate that Ms. Peabody took reasonable precautions against risk of undue harm, as required under Idaho law. See *Harrison v. Taylor*, *supra*.

Additionally, Plaintiff implies that ***McDonald v. Safeway Stores***, 109 Idaho 305, 707 P.2d 416 (1985), removes any requirement of notice from a landowner's duty to keep her premises free from dangerous conditions. (Plaintiff's Memorandum, pg. 6). That simply is not the ***McDonald*** Court's holding: the Court's primary holding in ***McDonald*** was to reaffirm the well-settled rule of law in Idaho that "to hold an owner or possessor of land liable for injuries to an invitee caused by a dangerous condition existing on the land, it must be shown that the owner or occupier knew, or by the existence of reasonable care, should have known of the existence of the dangerous conditions." *Id.* at 308, 707 P.2d at 419. In this case, even if there were evidence that Ms. Cook improperly cleaned the foot basin prior to the subject pedicure (which there is not), that would not supply even an inference that Ms. Peabody was or should have been aware of that. In other words, there is no evidence in the record that Ms. Peabody had any notice whatsoever of any dangerous condition on the premises (in fact, there is no evidence of any dangerous condition). Plaintiff's attempt to rework the state of the law in Idaho to obviate the long-standing notice requirement should be rejected outright, and under the current law in Idaho Ms. Peabody cannot be held liable for any injury arising from a dangerous condition of which she had no notice, constructive or otherwise.

4. Mr. Schoon's opinion is inadmissible, irrelevant to the question at hand, and fails to create a genuine issue of material fact.

To the extent Plaintiff has failed to respond to the Defendants' arguments for striking Schoon's disclosure, such portions should be deemed excluded. To the extent Schoon's disclosure does touch on any alleged failure by Ms. Peabody to conform to the applicable standard of care, Schoon's opinion still falls below the requirements of IRE 702.

Ms. Peabody's Motion to Strike the disclosure of Doug Schoon focused on the fact that Schoon lacks the qualifications to render an opinion on causation, attempts to testify regarding interpretations of law, and his opinion merely suggests possibilities and would only serve to invite conjecture. In response, Plaintiff simply concedes that Schoon's opinion is limited to the assertion that Ms. Peabody breached a duty by failing to maintain, clean, or sanitize her facility to the applicable standard of care. (Plaintiff's Memorandum, pg. 6). However, any expert opinion regarding breach of a duty is entirely irrelevant when the Plaintiff has not shown (and cannot show) that Ms. Peabody owed any duty to service Ms. Cook's customers or warn Ms. Cook's customers about Ms. Cook's services.

According to Schoon's opinion, Ms. Peabody improperly used Let's Touch to clean her foot basins. One problem with this argument is that, even assuming for purposes of this argument only, the Let's Touch product is not intended for use cleaning foot basins, the only evidence before the Court concerning Ms. Peabody's use of Let's Touch is that she used it to clean her foot basins when she performed pedicures on her own clients. There is no evidence that Ms. Peabody ever cleaned or sanitized a foot basin prior to use by Ms. Cook, had a duty to clean Ms. Cook's foot basins, or that the manner in which Ms. Peabody cleaned her foot basins was in any way the cause of Plaintiff's alleged injuries.

Even assuming for the sake of this argument only that Ms. Peabody improperly cleaned her own foot basins, that does not constitute evidence that Ms. Peabody breached any duty to Plaintiff. Evidence regarding how Ms. Peabody cleaned her own foot basins prior to use with her own clients is irrelevant and too remote in time to have any bearing on any of the facts of consequence to this case. See **Hoffman v.**

Barker, 80 Idaho 372, 377, 330 P.2d 978, 980 (1958) (upholding exclusion of evidence regarding the condition of a roadway one week prior to the subject accident, because the “evidence was too remote” to have any bearing on the condition of the roadway “at the time of the accident”). Thus, allowing the jury to consider such evidence in connection with Ms. Cook's use of foot basins and in relation to the incident the Plaintiff alleges caused her injuries would serve no other purpose than to invite conjecture and speculation, which is impermissible under Idaho law. See **Elce v. State**, 110 Idaho 361, 716 P.2d 505 (1986). That is, however, the only evidence Mr. Schoon can provide via his proposed testimony (as Plaintiff admits). Accordingly, Mr. Schoon's proposed testimony would not assist the trier of fact to understand the evidence or determine a fact in issue, and therefore does not pass the admissibility threshold of Rule 702.¹

As such, the only opinion remaining in Schoon's report are his comments dealing with the labeling and intended use for Let's Touch, and his statement that Ms. Peabody used it in violation of Federal law. In addition to being irrelevant under the facts of this case, what the label says regarding the intended use of Let's Touch, a common disinfectant used in beauty shops, is nothing that requires an expert opinion. The Let's Touch label speaks for itself and its reading by the jury is nothing that would require scientific, technical, or other specialized knowledge. See I.R.E. 702. Additionally, Schoon's opinion regarding how Ms. Peabody's use comports with Federal law constitutes impermissible opinion testimony regarding matters of law. See **Carnell v. Barker**, 137 Idaho 322, 48 P.3d 651 (2002).

¹ Of course, the situation might be different if Plaintiff had been one of Ms. Peabody's clients, rather than Ms. Cook's client, but that is not the case before this Court.

5. Ms. Peabody did not improperly "abdicate" any responsibility to the Bureau of Occupational Licenses.

Ms. Peabody had no responsibility to clean the foot basins for Ms. Cook prior to use on Ms. Cook's clients. Therefore, she could not have "abdicated" any such responsibility.

Plaintiff again tries to confuse the duties of an employer with those of a lessor by arguing that Ms. Peabody had a duty to ensure the facility's equipment was properly disinfected, and that she "abdicated" this purported duty by relying on the Idaho Bureau of Occupational Licenses to inspect each lessee and provide its inspection results. (Plaintiff's Memorandum, pg. 7). Plaintiff's argument, however, ignores the relationship between the parties in this case. There may well be situations in which an employer/spa owner could be found negligent in relying on the Bureau of Occupational Licensing rather than personally seeing to the sanitation of her employee's equipment. But this situation can occur only where the spa owner has employees, not where the spa owner contracts with lessees over whom she has no control, and who function as their own, individual business operators. A tenant or lessee having control of the premises is deemed, so far as third parties are concerned, to be the owner, and in case of injury to third parties occasioned by the condition or use of the premises, the general rule is that the tenant or lessee may be liable for failure to keep the premises in repair. ***Johnson v. K-Mart Corp.***, 126 Idaho 316, 317, 882 P.2d 971 (Idaho App. 1994). At the time of the pedicure, when she was using the foot basin, that describes Ms. Cook, and only Ms. Cook.

In this case, this Court has found that "Cook had full control over her business hours, methods of providing services, tools, and implements. Cook had full

control over her sanitation procedures. Cook was not supervised by Peabody or the Fingerprints Spa.” (Order Granting Defendants’ Motion for Summary Judgment on Count II, pg. 5). As such, Ms. Peabody could not “abdicate” any responsibility to the Bureau for ensuring Ms. Cook’s sanitation procedures were appropriate, because Ms. Peabody never had such responsibility. That is, it always was Ms. Cook’s responsibility, as the equipment operator, to ensure the instruments and equipment she used on her clients were appropriately sanitized. IDAPA 24.04.01.800.04 (“All instruments used by operators shall be sanitized after cleaning and prior to use on each patron....”). Accordingly, Plaintiff’s argument that Ms. Peabody “abdicated” responsibility for ensuring the foot basins were properly sanitized has absolutely no merit.

B. Plaintiff Cannot Establish Causation.

Ms. Peabody has moved to strike Mr. Schoon’s opinion partly on the grounds he is not qualified to render any opinion as to causation in this matter. In response, Plaintiff concedes that Schoon’s opinion does not touch on causation, claiming that it is Dr. Chandler who has provided expert testimony as to causation. (Plaintiff’s Memorandum, pg. 8). Dr. Chandler’s opinion on causation, however, suffers the same flaws as Mr. Schoon’s—it merely suggests possibilities and invites conjecture. In fact, Dr. Chandler’s “opinion” on causation is one of pure convenience: the Plaintiff went to Fingerprint’s Spa; she suffered a mycobacterial infection that first presented five months later; therefore, Plaintiff’s injuries must have been caused by her visit to the spa. (See Opinion Letter of Jeffrey L. Chandler, D.P.M., pg. 3). There is a time-honored phrase used to describe an “opinion” such as the one rendered by Dr. Chandler: *post hoc, ergo propter hoc* (“After this,

therefore because of this.”), which refers to one of the classic fallacies of formal logic. Such “evidence” of causation obviously falls below the standard in Idaho, which requires that the evidence must establish causation to a reasonable degree of medical probability. **Jones v. Emmett Manor**, 134 Idaho 160, 997 P.2d 621 (2000).

In fact, even under the more lenient standard for showing causation used by the Courts of Louisiana as cited to by Plaintiff (**Housley v. Cerise**, 579 So.2d 973 (La. 1991)), Dr. Chandler’s opinion still falls short. The rule of law relied upon by Plaintiff in **Housley** is:

A claimant’s disability is presumed to have resulted from an accident, if before the accident the injured person was in good health, but commencing with the accident the symptoms of the disabling condition appear and continuously manifest themselves afterwards, providing that the medical evidence shows there to be a reasonable possibility of causal connection between the accident and the disabling conditions.

Housely v. Cerise, 579 So.2d 973, 980 (1991) (emphasis added).² What Dr. Chandler lacks in his opinion is any evidence, other than pure coincidence—and a remote coincidence, at that (the symptoms did not “commenc[e] with the accident”)—of a causal connection between Plaintiff’s pedicure and her alleged medical problems.

Furthermore, the facts at issue in the other Louisiana case cited by Plaintiff, **DeTraz v. Lee d/b/a Virgin Nails**, are so distinguishable from the present case that **DeTraz** offers little help here. 900So. 2d 1099 (La.App. 3 Cir. 2005). Most importantly, the plaintiff in **DeTraz** presented to a medical provider with her injuries within a few days of the pedicure; in this case, the first time Plaintiff ever brought her alleged injuries to the

² Louisiana is, of course, the only Napoleonic Law state in the United States. Accordingly, the Louisiana courts (unlike Idaho courts) are not bound by precedent, nor do their decisions carry the same weight of precedent—even within the state of Louisiana. Suffice it to say, Louisiana law generally should carry little sway in Idaho.

attention of a medical provider, more than five months had passed. (Aff. of Tracy L. Wright, Exhibit B (DN045-46; DN001-03; DN006-007; DN004—005; DN008-009; GEM010-011)). Thus, unlike in *DeTraz*, the onset of Plaintiff's medical complaint in this case is too remote in time from the subject pedicure for Dr. Chandler to opine that Plaintiff's medical condition is, to a reasonable degree of medical probability, related to the pedicure. To Dr. Chandler's credit, he does not purport to do so. However, that is a requisite component of the formula for establishing medical causation under Idaho law: causation must be established to a reasonable degree of medical probability. See *Jones v. Emmet Manor*, *supra*. Dr. Chandler does not do that, and his opinion therefore does not establish evidence of causation in this case.

Furthermore, Dr. Chandler has rendered no opinion that Plaintiff's medical condition is related to the cleanliness of the foot basin; he states only that Plaintiff's condition is related to the "incident at the nail salon." (See Opinion Letter of Jeffrey L. Chandler, D.P.M., pg. 3). It is undisputed that Ms. Peabody did not perform the subject pedicure procedure; Ms. Cook did. Therefore, to the extent Dr. Chandler relates Plaintiff's medical condition to the "incident," his opinion has no bearing on (and does not establish evidence of) any alleged negligence by Ms. Peabody.

Relatedly, it would be impossible for Dr. Chandler to relate Plaintiff's medical condition to the cleanliness/sanitation of the foot basin, because Dr. Chandler has no personal knowledge of the foot basin. That is, there is no evidence the foot basin ever was inspected or tested by anyone. There certainly is no evidence that Dr. Chandler reviewed the results of any such testing. In fact, there is no evidence Dr. Chandler even was aware

of Plaintiff's foot basin theory when he rendered his opinion. (See *generally* Opinion Letter of Jeffrey L. Chandler, D.P.M.). Accordingly, it would be speculation for Dr. Chandler to relate the Plaintiff's medical condition to the foot basin, and it also would be speculation to infer that Dr. Chandler's Opinion Letter was intended to make such a connection.

C. Plaintiff's Motion to Strike Affidavit of Tracy L. Wright Is Without Merit.

Finally, Plaintiff has moved to strike Exhibit B to the Affidavit of Tracy L. Wright in Support of Defendants' Stacie Peabody and Fingerprints Day Spa's Motion to Strike the Disclosure of Doug Schoon, and for Summary Judgment Re: Count I – Negligence. Plaintiff cites no case authority in support of her Motion, and it warrants no serious consideration by the Court.

When a party moves for summary judgment, the initial burden of establishing the absence of a genuine issue of material facts rests with that party. ***Thomson v. Idaho Ins. Agency***, 126 Idaho 527, 887 P.2d 1034 (1994). I.R.C.P. 7(b)(3) permits filing affidavits in support of a motion so long as they are served with the motion. I.R.C.P. 56(e) states that "supporting and opposing affidavits [on a motion for summary judgment] shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

Following this Court's Order granting summary judgment to Ms. Peabody with respect to Count II of Plaintiff's Complaint, Ms. Peabody moved for summary judgment with respect to Count I. In support of Ms. Peabody's Motion for Summary Judgment, Count I, Defense Counsel submitted his affidavit (as allowed per the above-cited authority)

attaching Plaintiff's medical records as Exhibit B. Defense Counsel made no representations in his affidavit other than to affirm that the attached exhibits were true and correct copies. That is, Defense Counsel simply placed the medical records in the record to be considered by the Court in deciding the present Motion for Summary Judgment, Count I.³ Counsel's only further mention of the medical records appears in the Defendant's brief. What the Plaintiff misconstrues as Defense Counsel impermissibly rendering expert testimony regarding medical records actually is just Defense Counsel drafting a brief that advocates for his client and recites facts contained in medical records that originally were produced by the Plaintiff in discovery. This Court is free to give those records whatever weight they deserve. Plaintiff's Motion is a thinly disguised attempt to keep facts out of the record that are harmful to her case, and nothing more. As such, Ms. Peabody respectfully requests that the Court deny Plaintiff's Motion to Strike.

III. CONCLUSION

As stated in Defendant Peabody's Memorandum For Summary Judgment Re: Count I, the relevant questions in this matter are: (1) did Ms. Peabody have any duty to clean the foot basin prior to the subject pedicure; (2) is there evidence that Ms. Peabody breached any duty to clean the foot basin; and, (3) is there evidence of a causal link between any failure to clean the foot basin and Plaintiff's alleged injury. Plaintiff's arguments in response do not constitute admissible evidence sufficient to create a question of fact with respect to any of these three issues. Accordingly, summary judgment

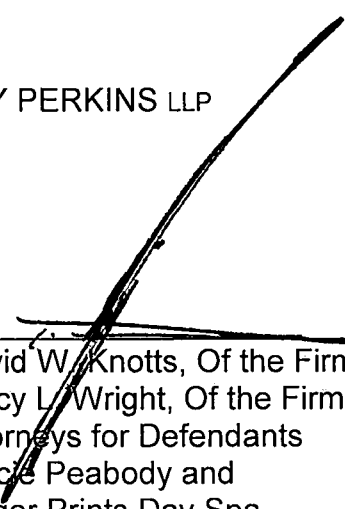
³ It is notable that Plaintiff's Counsel has filed a similar affidavit seeking to introduce evidence he wishes this Court to consider in determining this motion for summary judgment. See **Aff. James F. Jacobson in Opposition to Def.'s Second Mot. for S.J. and Mot. to Strike** (July 2, 2013); see also **Aff. James F. Jacobson in Opposition to Def.'s Mot. for S.J.** (May 14, 2013).

in favor of Ms. Peabody with respect to Count I is appropriate. In addition, Plaintiff's Motion to Strike is utterly unsupported, and therefore should be denied

DATED this 10th day of July, 2013.

CAREY PERKINS LLP

By


David W. Knotts, Of the Firm
Tracy L. Wright, Of the Firm
Attorneys for Defendants
Stacie Peabody and
Finger Prints Day Spa

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of July, 2013, I served a true and correct copy of the foregoing DEFENDANT'S REPLY MEMORANDUM RE: MOTION TO STRIKE AND MOTION FOR SUMMARY JUDGMENT, AND RESPONSE TO PLAINTIFF'S MOTION TO STRIKE by delivering the same to each of the following, by the method indicated below, addressed as follows:

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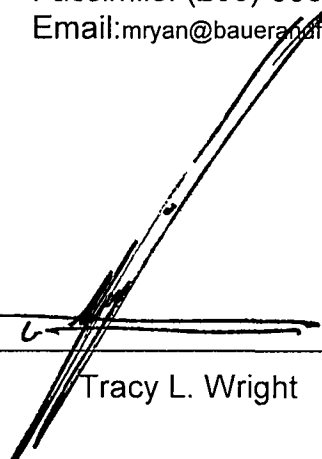
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Tracy L. Wright

COURT MINUTES

Moody Ho 072213

In Chambers

<u>TIME</u>	<u>SPEAKER</u>	<u>NOTE</u>
	Case Called	Tracy Sales v. Stacie Peabody CV-PI-12-06516
		Email Correspondence
		Plaintiff's Supplemental Memorandum

Cindy Ho

From: Judge Melissa Moody
Sent: Monday, July 22, 2013 03:40 PM
To: Cindy Ho
Subject: FW: Sales v. Peabody - Additional case citations
Attachments: Supplemental Memo on 2nd MSJ (Plaintiff).pdf

We will need to make this part of the court record (including attachment) also.

-----Original Message-----

From: James Jacobson [<mailto:james@jilawidaho.com>]
Sent: Monday, July 22, 2013 3:34 PM
To: Judge Melissa Moody
Cc: Tracy Wright
Subject: RE: Sales v. Peabody - Additional case citations

Judge Moody:

Please see the attached. Thank you.

James

James F. Jacobson, Esq.
Jacobson & Jacobson, PLLC
Phone: 884-1995 Ext. 103; Fax: 477-5210
660 E. Franklin Rd, Ste. 110
Meridian, Idaho 83642

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Thank you.

-----Original Message-----

From: Judge Melissa Moody [<mailto:mmoody@adaweb.net>]
Sent: Friday, July 19, 2013 9:48 PM
To: James Jacobson
Cc: Tracy Wright
Subject: RE: Sales v. Peabody - Additional case citations

That would be fine.

From: James Jacobson [james@jilawidaho.com]

Sent: Friday, July 19, 2013 9:07 PM
To: Judge Melissa Moody
Cc: Tracy Wright
Subject: Re: Sales v. Peabody - Additional case citations

Judge Moody:

It was Plaintiff's understanding that the court had permitted the submission of case citations only. Defendant has submitted additional argument as well. If the court is to consider Defendant's argument then Plaintiff would request the opportunity to respond by the end of the day on July 22, 2013. Thank you.

James

James F. Jacobson
Jacobson & Jacobson, PLLC
(208) 884-1995
(208) 477-5210 fax

On Jul 19, 2013, at 5:00 PM, Judge Melissa Moody <mmoody@adaweb.net<<mailto:mmoody@adaweb.net>>> wrote:

Received. Thank you.

From: Tracy Wright [<mailto:tlwright@careyperkins.com>]
Sent: Friday, July 19, 2013 4:53 PM
To: Judge Melissa Moody
Cc: James Jacobson
Subject: RE: Sales v. Peabody - Additional case citations

Judge Moody:

Attached is our Memorandum of Authority. *2nd Attachment*

Kind regards,

Tracy Lamar Wright
Carey Perkins LLP
Capitol Park Plaza
300 North 6th Street, Suite 200
P.O. Box 519
Boise, Idaho 83702
Telephone (208)345-8600
Facsimile (208)345-8660
tlwright@careyperkins.com<<mailto:tlwright@careyperkins.com>>

Carey Perkins LLP, www.careyperkins.com<<http://www.careyperkins.com/>>, has offices in Boise and Idaho Falls, Idaho, and has attorneys admitted to practice in Idaho, Oregon, Utah, Washington and Wyoming.

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From: Judge Melissa Moody [<mailto:mmoody@adaweb.net>]
Sent: Friday, July 19, 2013 4:21 PM
To: James Jacobson
Cc: Tracy Wright
Subject: RE: Sales v. Peabody - Additional case citations

Received. Thank you.

From: James Jacobson [<mailto:james@jilawidaho.com>]
Sent: Friday, July 19, 2013 4:20 PM
To: Judge Melissa Moody
Cc: Tracy Wright
Subject: Sales v. Peabody - Additional case citations

Judge Moody:

Below are the additional citations you allowed us to submit on the issue of causation being a factual issue. Thank you.

1. Lundy v. Hazen, 90 Idaho 323, 411 P.2d 768 (1966)
2. Newberry v. Martens, 142 Idaho 284, 127 P.3d 187 (2005)
3. Cramer v. Slater, 146 Idaho 868, 204 P.3d 508 (2009)

<image001.jpg>James F. Jacobson, Esq.
Jacobson & Jacobson, PLLC
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Thank you.

PLAINTIFF'S SUPPLEMENTAL MEMORANDUM

Plaintiff, Tracy Sales, by and through her counsel of record, Jacobson & Jacobson, PLLC, submits this supplemental explanation of authority presented in relation to the Court's allowing the submission of additional case citations on the issue of causation.

I.

ANALYSIS

The following is a quote from the case of *Cramer v. Slater*, 146 Idaho 868, 204 P.3d 508 (2009) setting forth the outline of the legal precedents and standards governing causation, both actual and proximate:

Proximate cause consists of actual cause and true proximate cause, which is also referred to as legal cause. *Newberry v. Martens*, 142 Idaho 284, 288, 127 P.3d 187, 191 (2005). In other words, proximate cause "is composed of two elements: cause in fact and scope of legal responsibility." *Sisters of the Holy Cross*, 126 Idaho at 1039, 895 P.2d at 1232. "Actual cause is the factual question of whether a particular event produced a particular consequence." *Newberry*, 142 Idaho at 288, 127 P.3d at 191. But true proximate cause focuses on whether legal policy supports responsibility being "extended to the consequences of conduct.... [it] determines whether liability for that conduct attaches." *Id.* (internal citations omitted) (quoting *Henderson v. Cominco American, Inc.*, 95 Idaho 690, 695, 518 P.2d 873, 878 (1973)). That is, "whether it was reasonably foreseeable that such harm would flow from the negligent conduct." *Sisters of the Holy Cross*, 126 Idaho at 1040, 895 P.2d at 1233. This Court must decide whether the injury and manner of the occurrence are "so highly unusual that we can say, as a matter of law that a reasonable [person], making an inventory of the possibilities of harm which his conduct might produce, would not have reasonably expected the injury to occur." *Id.* at 1041, 895 P.2d at 1234 (internal quotations and citations omitted) (quoting *Alegria v. Payonk*, 101 Idaho 617, 619-20, 619 P.2d 135, 137-38 (1980)). The question of proximate cause is one of fact and almost always for the jury. *Id.* at 1041, 895 P.2d at 1234. "[P]roximate cause is one of fact to be submitted to the jury and not a question of law for the court; if, upon all the facts and circumstances, there is a reasonable chance or likelihood of the conclusions of reasonable [people] differing, the question is one for the jury." *Id.* (quoting *Alegria*, 101 Idaho at 619-20, 619 P.2d at 137-38).

Thus, the issue of causation is an issue for the jury to determine except in only the most extraordinary of circumstances. Like many of the other cases cited by the parties, the

court in *Cramer* discusses the proper analysis to be applied when two potentially negligent actors exist:

The district court correctly found that ICRM had a duty to inform Curt of his HIV positive status and that ICRM breached that duty. Further, ICRM negligently failed to recommend Curt to counseling and treatment for the disease, which would have reduced or eliminated any subsequent negligence by Dr. Swanson. ICRM was in a position to prevent the ultimate result in this case by properly diagnosing and treating Curt; ICRM breached its duty to Curt and should not be relieved of its responsibility for that breach merely because Dr. Swanson subsequently engaged in foreseeable negligent conduct. In accordance with Restatement (Second) of Torts § 457, subsequent medical negligence is generally foreseeable. Although ICRM's potential liability will be reduced by a determination of any comparative negligence of Dr. Swanson pursuant to I.C. § 6-801, the comparative negligence statute does not reduce the foreseeability of Curt's injury; it merely reduces the liability of ICRM if the jury determines that Curt's death was proximately caused by ICRM's breach. Whether ICRM's actions proximately caused Curt's death is a question of fact for the jury. This Court reverses the district court's grant of summary judgment in favor of ICRM and holds that questions of fact exist as to whether ICRM proximately caused Curt's death. 146 Idaho at 876-877.

The only facts in the record regarding causation are the opinions of Dr. Chandler. Dr. Chandler's opinion is that Plaintiff's injuries were the result of a mycobacterial infection that she contracted while her feet were in Defendants' foot basin. The presence of the mycobacteria in the foot basin caused Plaintiff's injury. These are the facts in the record regarding causation. Given that *Cramer*; *Lundy v. Hazen*, 90 Idaho 323, 411 P.2d 768 (1966); and *Hayes v. Union Pac. R.R. Co.*, 143 Idaho 204, 141 P.3d 1073 (2006) all point to causation being a factual issue for the jury to determine, summary judgment on Plaintiff's claim based on causation would not be proper.

Indeed, the cases Defendants cite support this conclusion. *See Walenta v. Mark Means Co.*, 87 Idaho 543, 548, 394 P.2d 329 (Idaho 1964) (Where several causes producing an injury are concurrent and each is an efficient cause without which the injury would not have happened, the injury may be attributed to all or any of the causes, and recovery may be had against any or all of the responsible persons . . . Accordingly, where

several causes combine to produce injuries, a person is not relieved from liability because he is responsible for only one of them, it being sufficient that his negligence is an efficient proximate cause, without which the injury would not have resulted, . . . It is no defense to any one of the several defendants that the injury would not have resulted from his negligence alone, without the concurrent negligence or wrongful act of the other defendants.” Ordinarily, the jury must determine whether the factual situation presented constitutes an intervening efficient cause relied upon to prevent the negligence charged from being the proximate cause.).

Defendants’ argument has been, and continues to be, one of fact. What is both remarkable and troubling is that Defendants’ arguments regarding causation are made in the absence of any expert testimony to support them. Bare assertion cannot provide the basis for summary judgment.

Defendants provide no discussion of the elements governing superseding, intervening cause as set forth in the *Cramer* case, and they do not discuss how this case is factually analogous to the *Linder v. City of Payette* case. Defendants simply conclude that such a showing has been made. Defendants then spend the remainder of their supplemental memorandum revisiting the issue of legal duty. Defendants have grasped at every aspect of this case as it pertains to summary judgment, and they continue to do so. The case law submitted to the Court demonstrates that causation is a factual issue here to be determined by the jury and is not the proper basis for summary judgment.

Respectfully Submitted By:
James F. Jacobson
Attorney for Plaintiff

Judge Melissa Moody

From: Judge Melissa Moody
Sent: Saturday, July 20, 2013 11:28 AM
To: Cindy Ho
Subject: FW: Sales v. Peabody - Additional case citations
Attachments: memo of Authority.pdf

#2

From: Tracy Wright [<mailto:tlwright@careyperkins.com>]
Sent: Friday, July 19, 2013 4:53 PM
To: Judge Melissa Moody
Cc: James Jacobson
Subject: RE: Sales v. Peabody - Additional case citations

Judge Moody:

Attached is our Memorandum of Authority.

Kind regards,

Tracy Lamar Wright

Carey Perkins LLP
Capitol Park Plaza
300 North 6th Street, Suite 200
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Boise, Idaho 83702
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Carey Perkins LLP, www.careyperkins.com, has offices in Boise and Idaho Falls, Idaho, and has attorneys admitted to practice in Idaho, Oregon, Utah, Washington and Wyoming.

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From: Judge Melissa Moody [<mailto:mmoody@adaweb.net>]
Sent: Friday, July 19, 2013 4:21 PM
To: James Jacobson
Cc: Tracy Wright
Subject: RE: Sales v. Peabody - Additional case citations

Received. Thank you.

MEMORANDUM OF AUTHORITY IN SUPPORT OF DEFENDANTS MOTION FOR SUMMARY JUDGMENT, COUNT I

Defendants Stacie Peabody and Fingerprints Day Spa (hereinafter "Defendants") hereby submit the following Memorandum of Authority regarding causation. To summarize the Court's question for the parties concerning Defendants' Motion for Summary Judgment, Count I: Assuming Defendants had a general duty of care under ordinary circumstances to clean and sanitized the foot basins, and assuming Defendants breached that duty by failing to clean and sanitize the subject foot basin, the question here is one of causation. Can Defendants be held liable for any negligence on their part, or, was Defendant Cook's negligent act of pricking Plaintiff's foot a superseding cause for which Defendants cannot, as a matter of law, be held liable. The following law demonstrates that, under any construction of the facts of this case, only Defendant Cook's negligence can be considered the cause in fact of Plaintiff's injuries, if any, and only Defendant Cook, if anyone, may be held liable for Plaintiff's alleged damages.

The Court has zeroed in on the essential fact that is fatal to Plaintiff's claim against these Defendants. That is, Plaintiff cannot establish causation because the alleged prick to Plaintiff's toe happened after her foot was immersed in the foot basin. Thus, any contaminants in that basin could not possibly have led to Plaintiff's infection. Accordingly, the Plaintiff cannot possibly carry her burden to prove the element of causation.

AUTHORITY

1. ***State v. Corbus***, 150 Idaho 599, 249 P.3d 398 (2011): Causation consists of actual cause and true proximate cause. Actual cause is the factual question of whether a particular event produced a particular consequence. On the other hand, true proximate cause deals with 'whether it was reasonably foreseeable that such harm would flow from the negligent conduct.' In analyzing proximate cause, this Court must determine whether the injury and manner of occurrence are so highly unusual 'that a reasonable person, making an inventory of the possibilities of harm which his conduct might produce, would not have reasonably expected the injury to occur.'

An intervening, superseding cause is an independent act or force that breaks the causal chain between the defendant's culpable act and the victim's injury. In general, an intervening, superseding cause replaces the defendant's act as the proximate cause of the victim's injury.

2. ***Hayes v. Union Pac. R.R. Co.***, 143 Idaho 204, 208, 141 P.3d 1073 1078 (Idaho 2006) (internal cites omitted): Proximate cause consists of two factors: 1.) Cause in fact, and 2.) Legal responsibility. The legal responsibility element of proximate causation is satisfied if at the time of the defendant's negligent act, the claimant's injury

was reasonably foreseeable as a natural or probable consequence of the defendant's conduct. Only when reasonable minds could come to but one conclusion as to whether the claimant's injury was reasonably foreseeable may the judge decide this legal responsibility issue as a matter of law.

3. ***Linde v. Payette***, 64 Idaho 656, 135 P.2d 440, 441 (1943) (alterations in original) (internal citations omitted): The proximate cause of an event must be understood to be that which in a natural and continuous sequence, unbroken by a new cause, produces that event and without which that event would not have occurred.

The law regards the one as the proximate cause of the other, without regard to the lapse of time where no other cause intervenes or comes between the negligence [initial injury] charged and the injuries received to contribute to it. There must be nothing to break the causal connection between the alleged negligence [first accident and injury] and the injuries [death].

4. ***Walenta v. Mark Means Co.***, 87 Idaho 534, 394 P.2d 329 (1964): A superseding cause is one which so entirely supersedes the operation of the original Tort-Feasor's negligence that it alone without the original Tort-Feasor's negligence contributing in the slightest degree produces the injury. Before an intervening, superceding cause of an accident can become the sole proximate cause of the injury and thus relieve the first negligent wrongdoer of liability, such subsequent cause must have been unforeseen, not anticipated, and not a probable consequence of the original negligence. The determination of what constitutes the proximate cause of an accident is for the court, and not the jury, when the proof is so clear that different minds cannot reasonably draw different conclusions or where all reasonable minds would construe the facts and circumstance only one way.

2. ***Cramer v. Slater***, 146 Idaho 868, 204 P.3d 508 (2009): A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about. The following guidelines are used to determine whether an intervening act is a superseding cause:

- (a) The fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;
- (b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation;
- (c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand is not a normal result of such a situation;
- (d) the fact that the operation of the intervening force is due to a third

person's act or to his failure to act;

(e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him;

(f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.

ANALYSIS

Plaintiff has insisted throughout this matter that Defendants breached a duty to Plaintiff by failing to clean and sanitize the subject foot basin. Assuming for the sake of this argument only that Defendants did breach a duty to plaintiff, such breach can be neither the cause in fact nor the legal cause of Plaintiff's injuries.

Regarding cause in fact, the undisputed facts are that Defendant Cook soaked Plaintiff's foot in the subject foot basin prior to pricking Plaintiff's toe. See Aff. of Tracy Wright, Exhibit C, Dep. Tracy Sales (DNO 72-73; DNO84-87). The record contains no facts to suggest that following the pedicure procedure, Plaintiff's foot was again introduced to the subject foot basin. Thus, there simply is no possible way any contamination in the subject foot basin could have entered Plaintiff's body and subsequently caused Plaintiff's alleged infection. Absent any facts to suggest otherwise, Plaintiff's infection could only have been caused by one of the tools owned and used by Defendant Cook or by some unknown factor to which Plaintiff was exposed after her pedicure. Plaintiff has alleged no factor other than the foot basin for which Defendants would bear any responsibility. As such, any breach by Defendants in cleaning and sanitizing the subject foot basin can in no way be considered a cause in fact of Plaintiff's injuries. Accordingly, the Plaintiff cannot sustain her burden to prove the element of causation.

Alternatively, even if there were some minimal proof of each element of negligence on the part of these Defendants (which in our view is impossible as to the element of causation), Defendants still cannot be held legally responsible for Plaintiff's alleged injury; Defendant Cook's failure to clean the foot basin and subsequent pricking of Plaintiff's toe represents a superceding, intervening cause. Even if--assuming only for the sake of this argument--the facts could be interpreted such that Plaintiff's foot was introduced to the subject foot basin after she was pricked (thereby allowing any contaminants in the foot basin to cause Plaintiff's infection), there is no disputing that it was Defendant Cook's duty, independent of any duty owed by these Defendants, to clean the foot basins before each and every pedicure she performed. (See IDAPA 24.04.01.800.04) ("All instruments used by operators shall be sanitized after cleaning and prior to use on each patron...."). Since it is undisputable that the person giving a pedicure has a duty to clean and sanitize any foot basin prior to each and every pedicure, it is Defendant Cook's failure to ensure the cleanliness of the subject foot basin, not any failure by Defendants, that must be

considered the legal cause of Plaintiff's injuries. Defendant Cook's failure to clean the subject foot basin, then, was an intervening, superceding cause of the injury which, under the Idaho Supreme Court's holding in **Walenta**, was the sole proximate cause of the injury and thus served to relieve Defendants from any liability as a result of their first, assumed negligent act. Any negligence by Defendants, therefore, does not meet the legal responsibility requirement of proximate cause as stated in **Hayes**. Under the facts of this case, Plaintiff cannot show causation as a matter of law and, accordingly, summary judgment in favor of Defendants dismissing County I is proper.

JUL 25 2013

CHRISTOPHER D. RICH, Clerk
By SHARPY ABBOTT
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRACY SALES, individually,

Plaintiff,

vs.

STACIE PEABODY, individually and doing
business under the assumed name of
FINGERPRINTS DAY SPA; and LINDA
COOK, individually,

Defendants.

Case No. CVPI 12-06516

ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT
ON COUNT I

COURT APPEARANCES ON JULY 15, 2013

On July 15, 2013, the Court heard oral argument on Defendants' Motion for Summary Judgment on Count I of the Complaint. Plaintiff was represented by James Jacobson, Jacobson & Jacobson, PLLC. Defendants Stacie Peabody and Fingerprints Day Spa were represented by Tracy Wright, Carey Perkins, LLP. Defendant Linda Cook did not join in the motion for summary judgment and did not appear in person or through counsel on July 15, 2013.

BACKGROUND

On April 10, 2012, Plaintiff Sales filed a Complaint against Defendants Stacie Peabody, Fingerprints Day Spa, and Linda Cook. Plaintiff Sales alleges that her toe was injured during a pedicure performed by Linda Cook at Fingerprints Day Spa. During the time in question, April 2010, Defendant Stacie Peabody owned and operated Fingerprints Day Spa. Stacie Peabody leased space in the spa to Defendant Linda Cook. Linda Cook had her own spa clients and the Plaintiff in this action was one of Linda Cook's clients. Linda Cook was not an employee of Stacie Peabody or Fingerprints Day Spa.

Plaintiff claims that Linda Cook punctured her (Plaintiff's) foot during a pedicure, which resulted in an infection. Plaintiff alleges that her foot became infected because the punctured foot was exposed to bacteria from a dirty foot basin. As a result of these alleged events, Plaintiff sued Defendant Cook, Peabody, and Fingerprints Day Spa, claiming negligence against all three defendants.

There is some dispute about who was responsible for cleaning the foot basins on the spa property. In her affidavit, Linda Cook stated that Peabody was responsible for cleaning and maintaining the Fingerprints Spa and all the shared areas including the foot basins and tubs. (Cook Aff., ¶ 5, July 2, 2013.) Nevertheless, although Cook "understood it to be [Peabody's] responsibility to clean and disinfect the foot basins, [Cook] cleaned the foot basin [Cook] used." (*Id.* ¶ 6.) Stacie Peabody, in her deposition, was clear that she made no efforts to sanitize any tools or equipment at the salon beyond those she (Peabody) used for her clients. (Affidavit of James Jacobson, Ex. A., Deposition of Stacie Peabody, p.29, May 14, 2013.)

There were two counts in the Complaint. In Count II, Plaintiff alleged that Defendants Fingerprints Day Spa and Stacie Peabody were liable for the actions of Linda Cook under the doctrine of *respondeat superior*. The Court granted partial summary judgment to the Defendants on Count II of the Complaint on May 30, 2013, finding that the doctrine of *respondeat superior* did not apply.

On June 11, 2013, Defendants filed a motion for summary judgment on Count I as well as a motion to strike the affidavit of Doug Schooner.¹ On July 15, 2013, the parties argued the motion for summary judgment on Count II. The Court gave both parties until July 19, 2013 to provide the Court with additional legal authority. The parties were allowed to provide this authority by email. On July 19, 2013, both parties provided this authority by email.

After receiving Defendants' briefing, Plaintiff's counsel requested permission to provide additional briefing no later than close of business on July 22, 2013 and this request was granted. On July 22, 2013, Plaintiff submitted a supplemental memorandum. On July 22, 2013, the Court took the matter under advisement and now issues this decision.

STANDARD OF REVIEW

The general standard of review upon a motion for summary judgment was recently set forth in *Reynolds v. Trout Jones Gledhill Fuhrman, P.A.*:

[S]ummary judgment is proper "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled

¹ The motion to strike the affidavit of Doug Schooner is denied.

to a judgment as a matter of law.” . . . The moving party has the burden of proving that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. “This Court liberally construes all disputed facts in favor of the non-moving party, and all reasonable inferences drawn from the record will be drawn in favor of the non-moving party.” However, “I.R.C.P. 56(e) provides that the adverse party may not rest upon mere allegations in the pleadings, but must set forth by affidavit specific facts showing there is a genuine issue for trial.”

Reynolds v. Trout Jones Gledhill Fuhrman, P.A., 154 Idaho 21, 24, 293 P.3d 645, 648 (2013) (internal citations omitted).

DISCUSSION

In Count I of the Complaint, Plaintiff alleged that the Defendants were negligent:

In causing injury and damage to Plaintiff as a result of the performance of the pedicure; in failing to warn Plaintiff of potential risks involved in the pedicure procedure and in failing to keep tools and instruments in a safe and usable condition to avoid injury or infection to Plaintiff and others for whom they performed pedicure procedures; and otherwise failing to maintain the premises, facility, equipment, and working conditions in a safe and reasonably prudent manner to avoid injury or infection to Plaintiff and others for whom they performed pedicure procedures.

(Complaint, ¶ IX.)

This is a claim of negligence under the common law. The elements of common negligence are: (1) a duty, recognized by law, requiring the defendant to conform to a certain standard of conduct; (2) a breach of duty; (3) a causal connection between the defendant’s conduct and the resulting injuries; and (4) actual loss or damage. *Brooks v. Logan*, 127 Idaho 484, 489, 903 P.2d 73, 78 (1995) (*superseded by statute on another point of law*), citing *Alegria v. Payonk*, 101 Idaho 617, 619, 619 P.2d 135, 137 (1980).

Therefore, for Plaintiff's cause of action to survive summary judgment, a genuine issue of material fact must exist with respect to each of the above elements.

A. There Is a Genuine Issue of Material Fact for a Jury Regarding Duty, Breach, and Damage

1. Duty

The Defendants owed the Plaintiff a duty of "ordinary care" or "reasonable care." Both parties agree that the legal duty owed by Defendants to the Plaintiff was that of a landowner to an invitee. (See, Plaintiff's July 2, 2013 Memorandum, p. 6; Defendants' June 11, 2013 Memorandum, p. 10.) This is the duty of ordinary care. *McDevitt v. Sportsman's Warehouse, Inc.*, 151 Idaho 280, 284, 255 P.3d 1166, 1170 (2011). Whether the duty of ordinary care requires Stacie Peabody to warn Linda Cook's clients of pedicure dangers and/or clean Linda Cook's foot basin for Linda Cook's clients is a question of fact for the jury. *Cf. Harrison v. Taylor*, 115 Idaho 588, 596, 768 P.2d 1321, 1329 (1989) (noting that reasonable caution is almost always a question for the jury).

2. Breach

If the jury found that Stacie Peabody had a duty to keep the foot basin clean, Peabody's alleged failure to do this is a question of fact for the jury. Plaintiff has created a genuine issue of material fact regarding breach by alleging, through the affidavit of Doug Schoon, that Defendant Peabody "did not properly clean and disinfect her tub unit." (Affidavit of Doug Schoon, p. 2.) The fact that Stacie Peabody did not warn Linda Cook's client of pedicure dangers is not disputed.

3. Damage

Both parties agree that Plaintiff was injured; therefore, it summary judgment on this element is not appropriate.

B. There Is No Genuine Issue of Material Fact Regarding Causation

1. There Is No Evidence to Support the Claim that Peabody's Alleged Breach Caused the Injury, Let Alone Evidence to Create a Genuine Issue of Material Fact on this Element

The only evidence submitted by Plaintiff to support the element of causation is an affidavit from Dr. Chandler. (Plaintiff's July 2, 2013 Memorandum, p. 9 ("The only facts in the record are the opinions of Dr. Chandler regarding causation." See *also* Plaintiff's July 22, 2013 Supplemental Memorandum, p.2)

Dr. Chandler's opinion regarding causation consists entirely of the following question and response:

Is there a causal relationship between the injuries or conditions set forth in your answer above and the incident of April 19, 2010, incident involving Tracy Sales, Stacie Peabody dba Finger Prints Day Spa, and Linda Cook? If so, upon what do you base your opinion?

I do believe there is a causal relationship between the injuries Ms. Sales sustained and the treatment she received as a result to the incident at the salon in April 2010. She never has [sic?] any joint inflammation or lesions anywhere on her body up to this point, and after the incident that occurred on April 2010 is when she began to experience these problems.

(Affidavit of James Jacobson, May 14, 2013, Ex. E, Aff. of Dr. Chandler.)

Dr. Chandler does not state that a dirty foot basin caused – or even contributed – to Plaintiff's injury. Dr. Chandler does not mention whether "the incident" is a puncture, a dirty foot basin, the combination, or something else entirely.

In addition, Dr. Chandler does not state that he holds his belief regarding a causal relationship to a reasonable degree of medical certainty. The failure to do so may not be fatal in any given case; however, it is significant here because Dr. Chandler's current belief is the most recent of three beliefs, suggesting - in the absence of some assertion to the contrary – that this belief is conjecture or a working hypothesis.

Dr. Chandler stated:

...I felt at first it might be an ingrown toe nail; then thought might be psoriatic arthritis. However as this continued to be on going and no other lesions or psoriatic joint processes in any other place in her body except where the toe had been worked on by this salon in April of 2010, we² determined that it was a mycobacterial infection that was a result from the incident Tracy Sales had at the Salon.

(Id.)

Conjecture, speculation, or a working hypothesis is not enough to withstand summary judgment.

"To withstand a motion for summary judgment, the [non-moving party's] case must be anchored in something more solid than speculation; a mere scintilla of evidence is not enough to create a genuine issue." It is not the judge's function to weigh evidence, "but to determine whether there is a genuine issue for trial... [T]here is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." Summary judgment should be granted if the evidence in opposition to the motion "is merely colorable" or "is not significantly probative."

² It is unknown who "we" refers to.

R.G. Nelson, A.I.A., v. M.L. Steer, 118 Idaho 409, 410, 797 P.2d 117, 118 (1990) (internal citations omitted).

The evidence submitted by the Plaintiff in this case on the element of causation is not significantly probative; therefore, summary judgment is appropriate.

The Court acknowledges Plaintiff's argument that "Dr. Chandler's opinion is that Plaintiff's injuries were the result of a mycobacterial [infection] that she contracted while her feet were in Defendant's foot basin. The presence of the mycobacteria in the foot basin caused Plaintiff's injury." (Plaintiff's July 22, 2013 Supplemental Memorandum, p.2.) However, Plaintiff's argument is just that – argument. Plaintiff's theory of causation must be distinguished from the evidence in the record on causation. There is insufficient evidence in the record to create a genuine issue of material fact regarding whether Defendant Peabody's alleged breach caused the injury in this case.

2. Even if there Were Evidence that a Dirty Foot Basin Contributed to Plaintiff's Infection, Linda Cook's Puncture of Plaintiff's Foot Was a Superseding Event and Is an Alternative Basis for Summary Judgment

Construing all the facts in the light most favorable to the Plaintiff, indeed, exactly as Plaintiff has pled her case – Cook punctured Plaintiff's foot during a pedicure and Plaintiff's foot became infected. Plaintiff's infection resulted from the puncture and simultaneous exposure to the bacteria-rich environment of a dirty foot basin. As a matter of law, however, the (alleged) dirty foot basin did not cause Plaintiff's injury because the puncture was a superseding cause of any resulting injury.

"The breach of duty to be actionable must be the proximate cause of the injury complained of, that is, the cause which in natural and continuous sequence unbroken by any efficient intervening cause produces the result, and without which the result

would not have occurred.” *Chatterton v. Pocatello Post*. 70 Idaho 480, 484, 223 P.2d 389, 391, (1950) *citing* 65 C.J.S., Negligence, § 103, p.645.

It may be stated as a general rule that negligence which merely furnishes the condition or occasion upon which injuries are received, but does not put in motion the agency by which the injuries are inflicted is not the proximate cause thereof. *Id. citing* 38 Am. Jur. 702.

A dirty foot basin could only have been the “condition or occasion upon which injuries [were] received.” There is no evidence in the record that Plaintiff contracted an infection from putting her intact foot in a dirty basin.

The Idaho Supreme Court has set forth guidelines to be applied in determining whether an intervening act is a superseding cause:

- (1) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;
- (2) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation;
- (3) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand is or is not a normal result of such a situation;
- (4) the fact that the operation of the intervening force is due to a third person's act or failure to act;
- (5) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him;
- (6) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.

Cramer v. Slater, 146 Idaho 868, 877, 204 P.3d 508, 517 (2009).

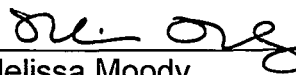
Applying these guidelines, the puncture allegedly inflicted by Linda Cook is a superseding cause of any resulting injury to Plaintiff's foot. Accordingly, summary judgment in favor of Defendants is appropriate on this alternate ground as well.

CONCLUSION

For the reasons stated above, Defendants' motion for summary judgment on Count I is granted.

IT IS SO ORDERED.

DATED this 24th day of July 2013.



Melissa Moody
District Judge

CERTIFICATE OF MAILING

I hereby certify that on this 25th day of July 2013, I mailed (served) a true

and correct copy of the within instrument to:

David W. Knotts
Tracy L. Wright
CAREY PERKINS, LLP
PO Box 519
Boise, ID 83701-0519

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Electronic Mail
☐ Facsimile

James F. Jacobson
Robert W. Jacobson
JACOBSON & JACOBSON, PLLC
660 E Franklin Rd, Ste 110
Meridian, ID 83642

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Electronic Mail
☐ Facsimile

Jeffrey P. Heineman
Attorney at Law
1501 Tyrell Lane
Boise, ID 83706

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Electronic Mail
☐ Facsimile

Margalit Z. Ryan
BAUER & FRENCH
PO Box 2730
Boise, ID 83701-2730

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Electronic Mail
☐ Facsimile

CHRISTOPHER D. RICH
Clerk of the District Court

By: 
Deputy Court Clerk

David W. Knotts, ISB No. 3627
Tracy L. Wright, ISB No. 8060
CAREY PERKINS LLP
Capitol Park Plaza
300 North 6th Street, Suite 200
P. O. Box 519
Boise, Idaho 83701
Telephone: (208) 345-8600
Facsimile: (208) 345-8660

Attorneys for Defendants
Stacie Peabody and
Fingerprints Day Spa

COPY

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

TRACY SALES, individually,

Plaintiff,

vs.

STACIE PEABODY, individually and
doing business under the assumed name
of FINGERPRINTS DAY SPA; and
LINDA COOK, individually,

Defendants.

Case No. CV PI 1206516

STIPULATION TO DISMISS LINDA
COOK

COME NOW Defendants Stacie Peabody and Fingerprints Day Spa, by and
through their attorneys of record, Carey Perkins LLP, and hereby stipulate to dismissal of
Defendant Linda Cook from the above-entitled lawsuit, with prejudice.

STIPULATION TO DISMISS LINDA COOK - 1

NO. _____ FILED _____
A.M. _____ P.M. _____

AUG 06 2013

CHRISTOPHER D. RICH, Clerk
By ELYSIA HOLMES
DEPUTY

000330

DATED this 6th day of August, 2013.

CAREY PERKINS LLP

By 151
David W. Knotts, Of the Firm
Tracy L. Wright, Of the Firm
Attorneys for Defendants
Stacie Peabody and
Finger Prints Day Spa

10 AM 1:25 PM

AUG - 7 2013

CHRISTOPHER D. RICH, Clerk
By SHARPY ABBOTT
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRACY SALES, individually,

Plaintiff,

vs.

STACIE PEABODY, individually and doing
business under the assumed name of
FINGERPRINTS DAY SPA; and LINDA
COOK, individually,

Defendants.

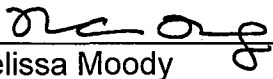
Case No. CVPI 12-06516

RULE 54(b) CERTIFICATE

IT IS HEREBY ORDERED, ADJUDGED AND DECREED and this does Order,
Adjudge and Decree that summary judgment be GRANTED in favor of Defendants
Stacie Peabody and Fingerprints Day Spa as to all claims.

IT IS SO ORDERED.

DATED this 7th day of August 2013.


Melissa Moody
District Judge

gh

CERTIFICATE OF MAILING

I hereby certify that on this 7th day of August 2013, I mailed (served) a true and correct copy of the within instrument to:

James F. Jacobson
Robert W. Jacobson
JACOBSON & JACOBSON, PLLC
660 E Franklin Rd, Ste 110
Meridian, ID 83642

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Electronic Mail
☐ Facsimile

Jeffrey P. Heineman
Attorney at Law
1501 Tyrell Lane
Boise, ID 83706

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Electronic Mail
☐ Facsimile

Margalit Z. Ryan
BAUER & FRENCH
PO Box 2730
Boise, ID 83701-2730

☒ U.S. Mail, Postage Prepaid
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☐ Electronic Mail
☐ Facsimile

David W. Knotts
Tracy L. Wright
CAREY PERKINS, LLP
PO Box 519
Boise, ID 83701-0519

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Electronic Mail
☐ Facsimile

CHRISTOPHER D. RICH
Clerk of the District Court

By: 
Deputy Court Clerk

Hoadley
Cindy
8/2/13 JH

NO. _____
A.M. _____ FILED 4:14 P.M. _____

AUG 07 2013

CHRISTOPHER D. RICH, Clerk
By ANNAMARIE MEYER
DEPUTY

JAMES F. JACOBSON, ISB #7011
ROBERT W. JACOBSON, ISB # 7156
JACOBSON & JACOBSON, PLLC
660 E. Franklin Road, Suite 110
Meridian, ID 83642
Telephone: (208) 884-1995
Facsimile: (208) 477-5210
Email: james@jjlawidaho.com
Email: bob@jjlawidaho.com

Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

TRACY SALES, individually;

Plaintiff,

vs.

STACIE PEABODY, individually and doing
business under the assumed name of
FINGERPRINTS DAY SPA; and LINDA
COOK, individually;

Defendants.

Case No. CV PI 1206516

**PLAINTIFF'S MOTION TO
RECONSIDER**

[No Oral Argument Requested]

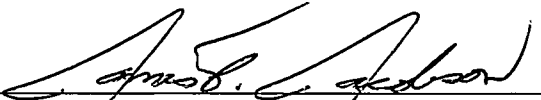
COMES NOW the above-named Plaintiff, by and through her counsel of record, Jacobson & Jacobson, PLLC, and pursuant to Rule 11(a)(2)(B) of the Idaho Rules of Civil Procedure, hereby moves this Court to reconsider this Court's Order granting summary judgment to Defendants. This Motion is supported by the Affidavit of James F. Jacobson in Support of Plaintiff's Motion to Reconsider and the Affidavit of Jeffrey L. Chandler, D.P.M. in Support of

sh

Plaintiff's Motion to Reconsider. Oral argument is not requested.

DATED this 7th day of August, 2013.

JACOBSON & JACOBSON, PLLC

By 
James F. Jacobson, Of the Firm
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of August, 2013, a true and correct copy of the foregoing was served upon the follow attorneys of record via method below:


David W. Knotts; Tracy L. Wright	<input type="checkbox"/>	U.S. Mail, postage prepaid
Carey Perkins, LLP	<input type="checkbox"/>	Hand-Delivered
Capitol Park Plaza	<input type="checkbox"/>	Overnight Mail
300 N. 6 th Street, Ste. 200	<input checked="" type="checkbox"/>	Facsimile (208) 345-8660
P. O. Box 519	<input checked="" type="checkbox"/>	Email:
Boise, ID 83701		dwknotts@careyperkins.com
<i>Attorneys for Defendant, Stacie Peabody</i>		tlwright@careyperkins.com
<i>and Fingerprints Day Spa</i>		
Jeffrey P. Heineman	<input checked="" type="checkbox"/>	U.S. Mail, postage prepaid
Heineman Law Office	<input type="checkbox"/>	Hand-Delivered
1501 Tyrell Lane	<input type="checkbox"/>	Overnight Mail
Boise, ID 83706	<input type="checkbox"/>	Facsimile (208) 947-9009
<i>Attorney for Defendant, Linda Cook</i>	<input type="checkbox"/>	Email: jeff@heinemanlaw.com
Margalit Z. Ryan	<input checked="" type="checkbox"/>	U.S. Mail, postage prepaid
Bauer & French	<input type="checkbox"/>	Hand-Delivered
P. O. Box 2730	<input type="checkbox"/>	Overnight Mail
Boise, ID 83701	<input type="checkbox"/>	Facsimile (208) 383-0412
<i>Attorney for Defendant, Linda Cook</i>	<input type="checkbox"/>	Email:
		mryan@bauerandfrench.com


James F. Jacobson

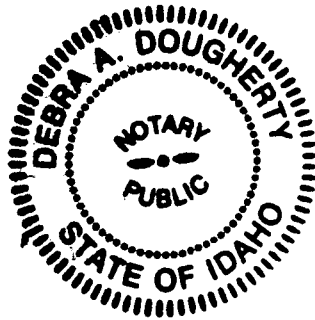
NO. _____ FILED _____ 416
A.M. _____ P.M. _____
AUG 07 2013
CHRISTOPHER D. RICH, Clerk
By ANNAMARIE MEYER
DEPUTY

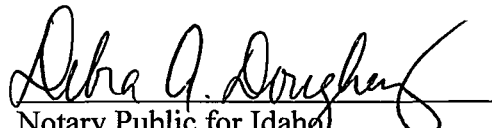
2. That attached hereto as Exhibit "A" is true and correct copy of my letter to Dr. Jeffrey L. Chandler dated April 11, 2013.

FURTHER, your Affiant sayeth naught.


James F. Jacobson

SUBSCRIBED AND SWORN to before me this 7th day of August,
2013.




Notary Public for Idaho
Residing at Eagle, Idaho
My Commission expires: 10-22-16

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of August, 2013, a true and correct copy of the foregoing was served upon the follow attorneys of record via method below:

David W. Knotts; Tracy L. Wright	<input type="checkbox"/>	U.S. Mail, postage prepaid
Carey Perkins, LLP	<input type="checkbox"/>	Hand-Delivered
Capitol Park Plaza	<input type="checkbox"/>	Overnight Mail
300 N. 6 th Street, Ste. 200	<input checked="" type="checkbox"/>	Facsimile (208) 345-8660
P. O. Box 519	<input checked="" type="checkbox"/>	Email:
Boise, ID 83701		dwknotts@careyperkins.com
<i>Attorneys for Defendant, Stacie Peabody</i>		tlwright@careyperkins.com
<i>and Fingerprints Day Spa</i>		
Jeffrey P. Heineman	<input checked="" type="checkbox"/>	U.S. Mail, postage prepaid
Heineman Law Office	<input type="checkbox"/>	Hand-Delivered
1501 Tyrell Lane	<input type="checkbox"/>	Overnight Mail
Boise, ID 83706	<input type="checkbox"/>	Facsimile (208) 947-9009
<i>Attorney for Defendant, Linda Cook</i>	<input type="checkbox"/>	Email: jeff@heinemanlaw.com
Margalit Z. Ryan	<input checked="" type="checkbox"/>	U.S. Mail, postage prepaid
Bauer & French	<input type="checkbox"/>	Hand-Delivered
P. O. Box 2730	<input type="checkbox"/>	Overnight Mail
Boise, ID 83701	<input type="checkbox"/>	Facsimile (208) 383-0412
<i>Attorney for Defendant, Linda Cook</i>	<input type="checkbox"/>	Email:
		mryan@bauerandfrench.com


James F. Jacobson



Jacobson & Jacobson, PLLC

Attorneys & Counselors at Law

Robert W. Jacobson ~ James F. Jacobson ~ Brian K. Marshall

Red Stone Springs Plaza
660 E. Franklin Road, Suite 110
Meridian, Idaho 83642-7297
Phone: 208-884-1995
Fax: 208-477-5210
Web: www.jjlawidaho.com
E-mail: office@jjlawidaho.com

April 11, 2013

Dr. Jeffrey Chandler
Anderson Plaza
222 N. 2nd St., Suite 301
Boise, ID 83702

Re: Tracy Sales vs. Stacie Peabody, et al.; CV PI 1206516

Dear Dr. Chandler:

I represent Tracy Sales in relation to her claims against Stacie Peabody *dba* Finger Prints Day Spa arising from an incident on April 19, 2010. I understand that you have been Ms. Sales' treatment provider and have performed one or more surgeries on Ms. Sales post April 19, 2010. Therefore, I trust that you are in possession of Ms. Sales medical records, including but not limited to those records generated from April 19, 2010, to the present, and that you are familiar generally with Ms. Sales medical history and familiar with Ms. Sales' treatment and medical condition resulting from her injuries sustained on April 19, 2010.

I am requesting your opinion (based upon a reasonable degree of medical probability), including supporting rationale, regarding the following issues:

1. What is the nature and extent of and your diagnosis with respect to any injuries or conditions pertaining to Tracy Sales' foot post April 19, 2010?
2. Is there a causal relationship between the injuries or conditions set forth in your answer above and the incident of April 19, 2010, incident involving Tracy Sales, Stacie Peabody *dba* Finger Prints Day Spa, and Linda Cook? If so, upon what do you base your opinion?
3. Has the treatment Tracy Sales received for her incident-related injuries proximately resulting from the April 19, 2010, incident been reasonable and necessary?
4. Are the costs for the treatment Ms. Sales has received for her incident-related injuries proximately resulting from the April 19, 2010, incident reasonable and in accordance with rates charged in your profession for similar services?
5. What is your prognosis with respect to Tracy Sales' foot injuries and/or conditions?
6. What is the nature and extent of any incident-related limitations, restrictions, or impairments, as well as applicable dates or time periods for such limitations, restrictions or impairments as it pertains to Tracy Sales?

EXHIBIT

tabbies

A

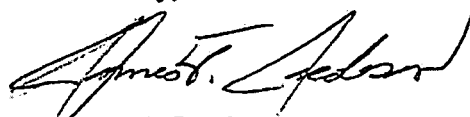
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Dr. Jeffrey Chandler
April 11, 2013
Page 2

7. What additional treatment, if any, do you recommend for Tracy Sales at this time?
8. What is the nature, extent, and reasonable cost estimate of any future medical treatment and/or procedures that Tracy Sales will need as a proximate result of her incident-related injuries sustained because the April 19, 2010, incident?
9. Any other observations or medical opinions that you may have relating to the injuries, medical complaints, limitations, on-going impairments, and future medical treatment Tracy Sales has received or will receive for her incident-related injuries proximately resulting from the April 19, 2010, incident?
10. What documentation have you reviewed in formulating your opinions and responses to the above questions?
11. What are your credentials, licenses, specialties, and professional associations or attainments?
12. What professional publications, articles, or other similar writings have you authored or co-authored within the last ten (10) years?
13. What is your compensation for providing your expert opinions in this action?

I would greatly appreciate it if I could receive your responses to these questions on or before April 23, 2013. Thank you for your time and attention to this matter. Please feel free to contact me should you have any questions.

Sincerely,



James F. Jacobson
JACOBSON & JACOBSON, PLLC

JFJ/dd
cc: client

000341

AUG 07 2013

CHRISTOPHER D. RICH, Clerk
By ANNAMARIE MEYER
DEPUTY

JAMES F. JACOBSON, ISB #7011
ROBERT W. JACOBSON, ISB # 7156
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Email: james@jjlawidaho.com
Email: bob@jjlawidaho.com

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL

DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRACY SALES, individually;

Plaintiff,

vs.

STACIE PEABODY, individually and doing
business under the assumed name of
FINGERPRINTS DAY SPA; and LINDA
COOK, individually;

Defendants.

Case No. CV PI 1206516

**AFFIDAVIT OF
JEFFREY L. CHANDLER, D.P.M. IN
SUPPORT OF PLAINTIFF'S MOTION
TO RECONSIDER**

STATE OF IDAHO)
) ss:
County of Ada)

JEFFREY L. CHANDLER, D.P.M., being first duly sworn upon oath, deposes
and says:

1. That this Affidavit of Jeffrey L. Chandler, D.P.M. is submitted in
support of Plaintiff's Motion to Reconsider.

2. That Affiant is a practicing board certified podiatrist.

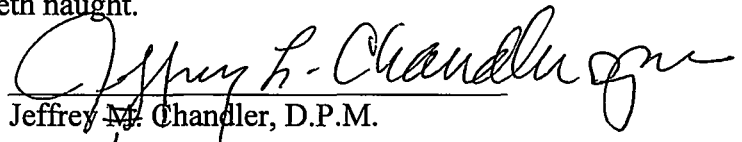
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3. In my opinion letter dated May 8, 2013, I stated that I determined Tracy Sales had suffered a mycobacterial infection that was a result of the incident at the Salon. This opinion is my opinion and was, as I stated, a determinative opinion after affirmatively ruling out two other potential diagnoses. By use of the word "incident," I was referring to the presence of mycobacteria in the foot basin in which Tracy Sales received the pedicure at the Salon. Whether Tracy Sales received a prick, a poke, or a movement of her cuticle at or around the same time is not material to my medical opinion. Tracy Sales toe would have been infected with the mycobacterial at that time regardless of whether a prick, a poke, or a movement of the cuticle occurred.

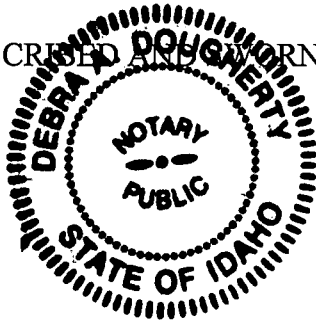
4. Likewise, my use of the word "treatment" in response to question number two in my opinion letter dated May 8, 2013, refers to the placement of Tracy Sales' feet in the foot basin at the Salon, where her toe became infected with a mycobacteria.

5. All of the opinions expressed in my May 8, 2013, opinion letter were based on a reasonable degree of medical probability, which was in response to the request Mr. Jacobson made in his April 11, 2013, letter to me requesting my medical opinion. None of my opinions expressed in this matter are based on conjecture or hypothesis.

FURTHER, your Affiant sayeth naught.


Jeffrey L. Chandler, D.P.M.

SUBSCRIBED AND FORN to before me this 30th day of July, 2013.



Debra A. Dougherty
Notary Public
Residing at Eagle, Idaho
My Commission expires: 10-22-16

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of ^{August} ~~July~~, 2013, a true and correct copy of the foregoing was served upon the follow attorneys of record via method below:

David W. Knotts; Tracy L. Wright
Carey Perkins, LLP
Capitol Park Plaza
300 N. 6th Street, Ste. 200
P. O. Box 519
Boise, ID 83701

*Attorneys for Defendant, Stacie Peabody
and Fingerprints Day Spa*

☐ U.S. Mail, postage prepaid
☐ Hand-Delivered
☐ Overnight Mail
☒ Facsimile (208) 345-8660
☒ Email:
dwknotts@careyperkins.com
tlwright@careyperkins.com

Jeffrey P. Heineman
Heineman Law Office
1501 Tyrell Lane
Boise, ID 83706
Attorney for Defendant, Linda Cook

☒ U.S. Mail, postage prepaid
☐ Hand-Delivered
☐ Overnight Mail
☐ Facsimile (208) 947-9009
☐ Email: jeff@heinemanlaw.com

Margalit Z. Ryan
Bauer & French
P. O. Box 2730
Boise, ID 83701
Attorney for Defendant, Linda Cook

☒ U.S. Mail, postage prepaid
☐ Hand-Delivered
☐ Overnight Mail
☐ Facsimile (208) 383-0412
☐ Email:
mryan@bauerandfrench.com

James F. Jacobson
James F. Jacobson

JAMES F. JACOBSON, ISB #7011
ROBERT W. JACOBSON, ISB # 7156
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Email: james@jjlawidaho.com
Email: bob@jjlawidaho.com

Attorneys for Plaintiff

NO. _____
A.M. _____ FILED _____
P.M. _____

AUG 07 2013

CHRISTOPHER D. RICH, Clerk
By ANNAMARIE MEYER
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL

DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRACY SALES, individually;

Plaintiff,

vs.

STACIE PEABODY, individually and doing
business under the assumed name of
FINGERPRINTS DAY SPA; and LINDA
COOK, individually;

Defendants.

Case No. CV PI 1206516

**PLAINTIFF'S MEMORANDUM IN
IN SUPPORT OF MOTION TO
RECONSIDER**

COMES NOW the above-named Plaintiff, Tracy Sales, by and through her counsel of record, Jacobson & Jacobson, PLLC, and hereby submits Plaintiff's Memorandum in Support of Motion to Reconsider. This Memorandum is supported by the Affidavit of James F. Jacobson in Support of Plaintiff's Motion to Reconsider and the Affidavit of Jeffrey L. Chandler, D.P.M. in Support of Plaintiff's Motion to Reconsider.

sh

I.

INTRODUCTION

On July 25, 2013, this Court entered its Order Granting Defendants' Motion for Summary Judgment on Count I. No final judgment has been entered in this action. The Court granted summary judgment in favor of Defendants based on the issue of causation. The Court has erred in finding that there is no genuine issue of material fact on the element of causation in relation to Plaintiff's negligence claim against Defendants. Plaintiff respectfully requests that this Court reconsider its order granting summary judgment in favor of Defendants' as to Count I. Plaintiff respectfully requests that this Court deny Defendants' summary judgment motion as to Count I and allow Plaintiff's cause of action to proceed to trial.

II.

STANDARD OF REVIEW

I.R.C.P. 11(a)(2)(B) allows a party to move for reconsideration of an interlocutory order. While a party moving for reconsideration may submit new or additional affidavits, depositions, or admissions in support thereof, such evidence is not essential to a motion for reconsideration and "the absence of new evidence accompanying [a] motion for reconsideration [does] not, standing alone, require that the motion be denied." *Johnson v. Lambros*, 143 Idaho, 468, 147 P.3d 100,105 (Ct. App. 2006).

On a motion for summary judgment "[a]ll disputed facts are to be construed liberally in favor of the non-moving party, and **all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party.**" *Purdy v. Farmers Ins. Co. of Idaho*, 138 Idaho 443, 65 P.3d 184, 186 (2003), citing, *Infanger v. City of Salmon*, 137 Idaho 45, 44 P.3d 1100 (2002)(Emphasis added). If the record

contains any conflicting inferences upon which reasonable minds might reach different conclusions, summary judgment must be denied. *McCoy v. Lyons*, 120 Idaho 765, 769, 820 P.2d 360, 364 (1991). Summary judgment is inappropriate “if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there” are genuine issues relating to material facts in the case. *See Id.*

III.

ARGUMENT

This Court has held that Plaintiff has failed to demonstrate a genuine issue of material fact on the element of causation. This ruling is in error. The first basis for the Court’s ruling deals with the expert medical opinions of Dr. Jeffrey Chandler. The Court determined that the term “the incident” as used by Dr. Chandler in expressing his expert opinions on causation was too vague or ambiguous. However, the reasonable inference to be drawn from Dr. Chandler’s opinion, when read as a whole, is that Plaintiff’s injuries were caused by the presence of mycobacteria in the foot basin in which Plaintiff received her “treatment” at the Salon, *i.e.* the pedicure that she received in the foot basin. On a motion for summary judgment, the Plaintiff, as the non-moving party, is entitled to all reasonable inferences in the record.

Additionally, Plaintiff has submitted another affidavit from Dr. Chandler clarifying and explaining his use of the words “the incident” in his opinions. Dr. Chandler’s opinion is that the presence of mycobacteria in the foot basin at Defendants’ Salon where Plaintiff received her pedicure caused her injuries to her toe. (Chandler Affidavit in Support of Motion to Reconsider; ¶ 3-4). Dr. Chandler’s opinion regarding causation is firm, clear, and un-equivocating.

The Court also held that Dr. Chandler's opinions regarding causation were the product of conjecture, speculation, or a working hypothesis. The Court has either misread or mis-construed Dr. Chandler's opinion. After describing how he ruled out two other possible causes, Dr. Chandler then stated that he "determined" that Plaintiff's injuries were the result of a mycobacterial infection. The word "determined" does not connote hypothesis, speculation, or conjecture. Plaintiff's reading of Dr. Chandler's opinion is not tortured or grasping, but rather the reasonable and logical conclusion of the words he used. Dr. Chandler's affidavit submitted in conjunction with this motion reaffirms the strength of his original opinion. (Chandler Affidavit in Support of Motion to Reconsider; ¶ 3-4).

All of Dr. Chandler's opinions expressed in this action are based on a reasonable degree of medical probability, which is the proper standard for causation opinions in a negligence action and which was in response to Plaintiff's counsel's request in his April 11, 2013, letter to Dr. Chandler. *Roberts v. Kit Mfg. Co., Inc.*, 124 Idaho 946, 948, 866 P.2d 969 (1993). (Jacobson Affidavit in Support of Motion to Reconsider; ¶ 2) (Chandler Affidavit in Support of Motion to Reconsider; ¶ 5).

Significantly, the issue of the claimed inadequacy of wording of Dr. Chandler's causation opinions was brought up *sua sponte* by the Court. The issue was never briefed by the parties through two motions for summary judgment, and the Court only requested case law on this issue of causation from the parties after oral argument on the second summary judgment motion. Not until this point has Plaintiff had the opportunity to respond to any claimed deficiency in the wording of Dr. Chandler's opinions.

As a second basis for granting summary judgment, the Court held as a matter of law that a "puncture" was a superseding cause of Plaintiff's injuries. Nowhere in

Plaintiff's complaint is it alleged that the harm or injury was caused by or directly flowed from a "puncture." See Complaint, ¶ VII. It is only alleged that such puncture occurred. Assuming the Court's statement in its ruling that the plaintiff's injury was caused by the simultaneous exposure to the dirty foot basin and the puncture, the puncture, under the analysis of the case law cited, could not be considered a superseding act. Both parties submitted multiple Idaho cases on the issue of superseding cause, none of which supports the conclusion that a superseding cause exists in this case. While the Court sets forth the appropriate factors to consider pursuant to *Cramer v. Slater*, 146 Idaho 868, 204 P.3d 508 (2009), the Court offers no analysis of those factors or their application to this case. Indeed, the Court offers only the summary conclusion that they apply. Overwhelmingly, the cases cited to by the parties on the issue of superseding cause have held that it is a factual question to be resolved by the jury. Those cases, pursuant to the Court's statement, are part of the record in this action. Further, the Court, without any supporting evidence in the record, determined that the poke, puncture, or prick was essential to the mycobacterial infection. Dr. Chandler's affidavit submitted in support of this motion resolves that issue in the negative as well. (Chandler Affidavit in Support of Motion to Reconsider; ¶ 3).

Dr. Chandler's opinions in this action are sufficient to demonstrate, at a minimum, a genuine issue of material fact as to the causation of Plaintiff's injuries. Thus, summary judgment as to Plaintiff's claim of negligence against Defendants is improper.

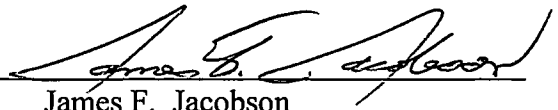
IV.

CONCLUSION

Plaintiff respectfully requests this Court reconsider its order granting summary judgment as to Count I and deny Defendants' summary judgment motion.

DATED this the 7th day of August, 2013.

JACOBSON & JACOBSON, PLLC

By: 
James F. Jacobson
Attorney for Plaintiff

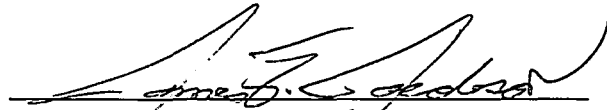
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of August, 2013, a true and correct copy of the foregoing was served upon the follow attorneys of record via method below:

David W. Knotts; Tracy L. Wright	<input type="checkbox"/>	U.S. Mail, postage prepaid
Carey Perkins, LLP	<input type="checkbox"/>	Hand-Delivered
Capitol Park Plaza	<input type="checkbox"/>	Overnight Mail
300 N. 6 th Street, Ste. 200	<input checked="" type="checkbox"/>	Facsimile (208) 345-8660
P. O. Box 519	<input checked="" type="checkbox"/>	Email:
Boise, ID 83701		dwknotts@careyperkins.com
<i>Attorneys for Defendant, Stacie Peabody</i>		tlwright@careyperkins.com
<i>and Fingerprints Day Spa</i>		

Jeffrey P. Heineman	<input checked="" type="checkbox"/>	U.S. Mail, postage prepaid
Heineman Law Office	<input type="checkbox"/>	Hand-Delivered
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Boise, ID 83706	<input type="checkbox"/>	Facsimile (208) 947-9009
<i>Attorney for Defendant, Linda Cook</i>	<input type="checkbox"/>	Email: jeff@heinemanlaw.com

Margalit Z. Ryan	<input checked="" type="checkbox"/>	U.S. Mail, postage prepaid
Bauer & French	<input type="checkbox"/>	Hand-Delivered
P. O. Box 2730	<input type="checkbox"/>	Overnight Mail
Boise, ID 83701	<input type="checkbox"/>	Facsimile (208) 383-0412
<i>Attorney for Defendant, Linda Cook</i>	<input type="checkbox"/>	Email:
		mryan@bauerandfrench.com


James F. Jacobson

NO. _____
A.M. _____ P.M. 3:06
AUG - 8 2013
CHRISTOPHER D. RICH, Clerk
By CHARY ABBOTT
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRACY SALES, individually,

Plaintiff,

vs.

STACIE PEABODY, individually and doing
business under the assumed name of
FINGERPRINTS DAY SPA; and LINDA
COOK, individually,

Defendants.

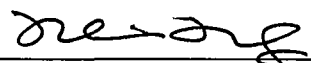
Case No.. CVPI 12-06516

ORDER OF DISMISSAL ON
DEFENDANT LINDA COOK
ONLY

Based upon the stipulation of the parties at a telephonic status conference on August 8, 2013, where Plaintiff was represented by James Jacobson and Defendant Linda Cook was represented by Margalit Ryan, the Court hereby dismisses Defendant Linda Cook from the action, with each party to bear their own fees and costs.

IT IS SO ORDERED.

DATED this 8th day of August 2013.



Melissa Moody
District Judge



CERTIFICATE OF MAILING

I hereby certify that on this 9th day of August 2013, I mailed (served) a true and correct copy of the within instrument to:

James F. Jacobson
Robert W. Jacobson
JACOBSON & JACOBSON, PLLC
660 E Franklin Rd, Ste 110
Meridian, ID 83642

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☐ Hand Delivered
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Jeffrey P. Heineman
Attorney at Law
1501 Tyrell Lane
Boise, ID 83706

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☐ Facsimile

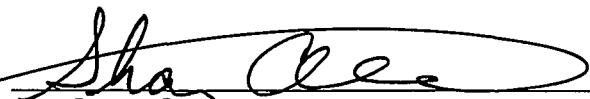
Margalit Z. Ryan
BAUER & FRENCH
PO Box 2730
Boise, ID 83701-2730

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David W. Knotts
Tracy L. Wright
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☐ Electronic Mail
☐ Facsimile

CHRISTOPHER D. RICH
Clerk of the District Court

By: 
Deputy Court Clerk

Moody
Linda
8/26/13
Sh.

David W. Knotts, ISB No. 3627
Tracy L. Wright, ISB No. 8060
CAREY PERKINS LLP
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Attorneys for Defendants
Stacie Peabody and
Fingerprints Day Spa

NO. _____ FILED _____ 909
A.M. _____ P.M. _____

AUG 23 2013

CHRISTOPHER D. RICH, Clerk
By CHRISTINE SWEET
DEPUTY

ORIGINAL

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

TRACY SALES, individually,

Plaintiff,

vs.

STACIE PEABODY, individually and
doing business under the assumed name
of FINGERPRINTS DAY SPA; and
LINDA COOK, individually,

Defendants.

Case No. CV PI 1206516

DEFENDANTS STACIE PEABODY
AND FINGERPRINTS DAY SPA'S
MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTION FOR
RECONSIDERATION

I. INTRODUCTION

Defendants Stacie Peabody and Fingerprints Day Spa ("Defendants"), by and through their counsel of record, Carey Perkins LLP, herby submit the following Memorandum in Opposition to Plaintiff's Motion for Reconsideration. Plaintiff has not requested oral argument, and Defendants concur that oral argument is not necessary,

DEFENDANTS STACIE PEABODY AND FINGERPRINTS DAY SPA'S MEMORANDUM
IN OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION - 1

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because the Court's decision to grant summary judgment to Defendants clearly was, and is, appropriate; there is nothing of substance to "reconsider."

Plaintiff's Motion for Reconsideration should be denied, because: (1) Plaintiff still has not put forth competent evidence sufficient to create a genuine issue of material fact regarding causation, and alternatively (2) the evidence in the record demonstrates that Defendant Cook's actions constitute a superceding cause of Plaintiff's injury, if any. Accordingly, these Defendants respectfully request the Court deny Plaintiff's Motion for Reconsideration.

II. STANDARD OF REVIEW

The decision to grant or deny a request for reconsideration of an interlocutory order generally rests in the sound discretion of the trial court. *Puckett v. Verska*, 144 Idaho 161, 158 P.3d 937 (2007). "A rehearing or reconsideration in the trial court usually involves new or additional facts, and a more comprehensive presentation of both law and fact." *Coeur d'Alene Mining Company v. First National Bank of North Idaho*, 118 Idaho 812, 823, 800 P.2d 1026, 1038 (1990) (quoting *J.I. Case Co. v. McDonald*, 76 Idaho 223, 229, 280 P.2d 1070, 1073 (1955)).

III. ARGUMENT

A. The "Opinions" of Dr. Chandler Remain Speculative and Conclusory, and Therefore Do Not Constitute Admissible Evidence Sufficient to Create a Genuine Issue of Material Fact Regarding Causation.

The Court correctly found that "[t]he evidence submitted by the Plaintiff on the element of causation is not significantly probative." **Ord. Granting Defs.' Mot. S.J. On**

Count I p.8 (July 25, 2013) (hereinafter "Order"). Specifically with regard to the materials submitted by Plaintiff's expert Dr. Chandler, the Court found that his opinions amounted to "conjecture," and pointed out that "[c]onjecture, speculation, or a working hypothesis is not enough to withstand summary judgment." *Id.* at p.7. Plaintiff's latest submissions do not change the nature or outcome of the Court's analysis. Therefore, the Court's Order granting summary judgment to these Defendants should not be disturbed.

The recently filed Affidavit of Jeffrey M. Chandler, D.P.M. in Support of Plaintiff's Motion to Reconsider ("Chandler Affidavit") does not correct the essential flaw this Court found with his original opinions, i.e. that they are merely conjecture. As previously pointed out by Defendants in their Reply Memorandum (July 10, 2013), Dr. Chandler lacks any support for his conclusions. That is, although he now purports, without explanation, to have "determined" Plaintiff suffered a mycobacterial infection, it is a matter of rank conjecture for him to relate Plaintiff's medical condition to the cleanliness/sanitation of the foot basin, because Dr. Chandler has no personal knowledge—or even second-hand knowledge—of the foot basin: there is no evidence the foot basin ever was inspected or tested by anyone (much less Dr. Chandler); there is no evidence that Dr. Chandler reviewed the results of any such testing or relied on them in forming his conclusions; and, in fact, there is no evidence whatsoever the foot basin was unclean. Accordingly, it could only be speculation for Dr. Chandler to relate the Plaintiff's medical condition to the foot basin, where his starting point is but an assumption, without any evidence to support it, that the foot basin actually was unclean.¹ As this Court already has pointed out, without

¹ The only "testing" ever performed was done by the Idaho Bureau of Occupational Licenses, which confirmed the cleanliness of the salon, including the foot basin. Therefore, Dr. Chandler's assumptions directly conflict with the evidence in the record, further demonstrating that his opinions are not reliable.

evidence to support it, Plaintiff's causation argument is just argument, which is not sufficient to defeat summary judgment, regardless of how it is viewed. *Id.* at p.8; see *a/so R Homes Corp. v. Herr*, 142 Idaho 87, 93, 123 P.3d 720, 726 (Idaho App. 2005) ("All reasonable inferences must be drawn in favor of a party resisting summary judgment, but the inferences must be drawn from evidence.").

Furthermore, Dr. Chandler has not laid any foundation for the opinions expressed in his affidavit, other than to testify that he "ruled out two other potential diagnoses"; therefore, his affidavit is not competent evidence to oppose summary judgment. Chandler Affidavit ¶ 3. That is, he provides the Court with no basis for ruling out the "two other potential diagnoses," nor for ruling in a diagnosis of mycobacterial infection—then leaping to the utterly unexplicated and unfounded conclusion discussed above regarding the alleged source of any such infection.² Accordingly, the Court need not consider or accept these new Chandler materials in evaluating its decision to grant summary judgment to Defendants, as they do not satisfy the requirement of Rule 56(e). See *State of Idaho v. Shama Resources Ltd.*, 127 Idaho 267, 271, 899 P.2d 977, 981 (1995) ("The requirements of Rule 56(e) are not satisfied by an affidavit that is conclusory, based on hearsay, and not supported by personal knowledge."); *Rhodehouse v. Stutts*, 125 Idaho 208, 211, 868 P.2d 1224, 1227 (1994) (finding that the question of admissibility of affidavits under Rule 56(e) is a "threshold question to be analyzed before applying the

² Dr. Chandler's recent statement that his conclusory opinions "were based on a reasonable degree of medical probability" does not cure them of the problem that they are conclusory. Chandler Affidavit ¶ 5. Furthermore, his statement constitutes an untimely supplementation of his disclosure of opinions, and accordingly should not be considered by the Court. And, Plaintiff is mistaken in complaining that "the issue of the claimed inadequacy of wording of Dr. Chandler's causation opinions was brought up *sua sponte* by the Court." **Pl.'s Memo. In Support of Mot. To Reconsider** p.4 (Aug. 7, 2013). Defendants alerted Plaintiff to that deficiency in their Reply Memorandum. See **Defs.' Reply Memo.** p.17 (July 10, 2013).

liberal construction and reasonable inferences rules when reviewing motions for summary judgment.”); *Montgomery v. Montgomery*, 147 Idaho 1, 6, 205 P.3d 650, 655 (2009) (“[T]rial courts must determine the admissibility of evidence as a ‘threshold question’ to be answered before addressing the merits of motions for summary judgment.”).

B. Alternatively, The Record Reflects That Defendant Cook’s Actions Constitute a Superceding Cause of the Alleged Injury.

First, Dr. Chandler’s testimony cannot be read to conclusively rule out a prick, a poke, and a movement of the cuticle as potential mechanisms by which mycobacteria allegedly was introduced into Plaintiff’s foot. That is, Dr. Chandler’s opinion does not, as Plaintiff contends, resolve “in the negative” whether “the poke, puncture, or prick was essential to the mycobacterial infection” and, thus, does not remove Ms. Cook as a superceding cause. **Pl.’s Memo. In Support of Mot. To Reconsider** p.5 (Aug. 7, 2013). Dr. Chandler has testified to the following: “Whether Tracy Sales received a prick, a poke, or a movement of her cuticle at or around the same time is not material to my medical opinion. Tracy Sales [sic] toe would have been infected with the mycobacterial [sic] at that time regardless of whether a prick, a poke, or a movement of the cuticle occurred.” Chandler Affidavit ¶ 3. However, not only is that statement conclusory and pure conjecture (with the attendant problems discussed above), but being stated in the disjunctive it also is hopelessly ambiguous. Specifically, Dr. Chandler’s testimony demonstrates only that Dr. Chandler does not know (or care) which, among “a prick, a poke, or a movement of the cuticle,” was the mechanism of Plaintiff’s alleged injury.³ Thus, if the Court finds the

³ To explain by way of analogy: it does not matter whether Dr. Chandler’s opinions constitute “conjecture, speculation or a working hypothesis,” because either condition is sufficient to render the opinions inadmissible. Likewise, it does not matter whether “a prick, a poke, or a movement of the cuticle occurred,” because either would constitute a superceding cause of Plaintiff’s alleged injury.

Chandler Affidavit constitutes admissible evidence (which these Defendants do not concede), it is “merely colorable” evidence that Plaintiff is seeking to have the Court weigh in its favor. The Idaho Supreme Court has clearly stated that it is not the trial court’s function to weigh evidence, and that “merely colorable” evidence is insufficient to oppose summary judgment. ***R.G. Nelson, A.I.A. v. M.L. Steer***, 118 Idaho 409, 410, 797 P.2d 117, 118 (1990).

Second, with Plaintiff’s *respondeat superior* claim dismissed, Plaintiff would like to take back her pleadings and pretend Linda Cook had nothing to do with the alleged injury. However, Plaintiff’s pleadings constitute judicial admissions that she cannot take back. ***Strouse v. K-Tek, Inc.***, 129 Idaho 616, 618, 930 P.2d 1361, 1363 (Idaho App. 1997) (citing ***McLean v. City of Spirit Lake***, 91 Idaho 779, 783, 430 P.2d 670, 674 (1967)). Contrary to Plaintiff’s revised characterization of the allegations in her Complaint, her contention always has been that the mechanism of injury was Ms. Cook’s actions: “During the pedicure Plaintiff’s right toe was punctured or otherwise injured by an instrument or instruments being used to perform the pedicure. Defendant Linda Cook performed the pedicure on the date of the incident at Defendant Peabody’s facility” (**Plf.’s Compl. ¶ VII**) (emphasis added); “[d]uring the course of the pedicure, Plaintiff experienced pain in her right toe. This pain was the result of some puncture of or trauma to Plaintiff’s toe, which when exposed to mycobacteria in the foot basin of the pedicure station, caused severe injury to Plaintiff’s toe that resulted in multiple surgical procedures” (**Plf.’s Memo. In Opposition to Def.’s Mot. For S.J.**, “Statement of Material Facts” p.4) (emphasis added). Thus, Plaintiff has conceded that Ms. Cook’s actions were a proximate cause of her injuries, if any.

Finally, as this Court previously pointed out, applying the ***Cramer v. Slater***, 146 Idaho 868, 877, 204 P.3d 508, 517 (2009), factors to the present set of facts reveals that Ms. Cook's actions legally constitute a superceding cause of the alleged injury, and that these Defendants cannot therefore be held liable for said injury. Plaintiff's new submissions do not change the fact that all of the ***Cramer*** factors are satisfied. The key consideration is: there is no competent evidence, whatsoever, that a mycobacterial infection of Plaintiff's toe, if there was one, would have, or could have occurred without the injury allegedly inflicted by Ms. Cook, over whom these Defendants had no control. Thus, the "wrongful act of a third person," Ms. Cook, who was at the time "operating independently of any situation created by" these Defendants' alleged negligence, set in motion an "intervening force" that brought about an alleged harm "different in kind" from anything these Defendants might have caused, and which was "extraordinary rather than normal in view of the circumstances." *Id.* Thus, the ***Cramer*** factors all are satisfied.

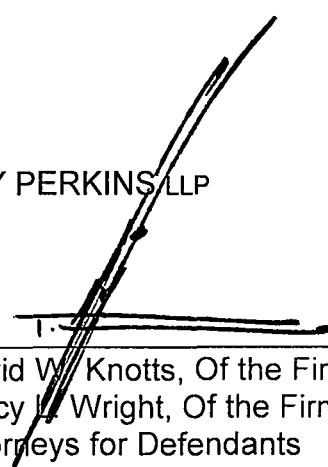
IV. CONCLUSION

Based on the foregoing reasons, these Defendants respectfully request this Court leave the current Order Granting Defendants' Motion for Summary Judgment on Count I undisturbed and take no action on Plaintiff's Motion for Reconsideration.

DATED this 23rd day of August, 2013.

CAREY PERKINS LLP

By


David W. Knotts, Of the Firm
Tracy L. Wright, Of the Firm
Attorneys for Defendants
Stacie Peabody and
Finger Prints Day Spa

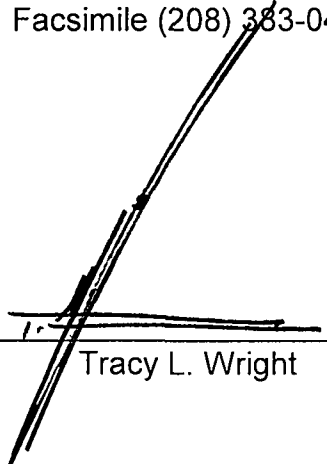
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of August, 2013, I served a true and correct copy of the foregoing DEFENDANTS STACIE PEABODY AND FINGERPRINTS DAY SPA'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION by delivering the same to each of the following, by the method indicated below, addressed as follows:

James F. Jacobson	<input type="checkbox"/>	U.S. Mail, postage prepaid
Robert W. Jacobson	<input type="checkbox"/>	Hand-Delivered
JACOBSON & JACOBSON, PLLC	<input type="checkbox"/>	Overnight Mail
660 E. Franklin Rd., Ste. 110	<input checked="" type="checkbox"/>	Facsimile (208) 477-5210
Meridian, Idaho 83642		
Telephone: (208) 884-1995		
<i>Attorneys for Plaintiff</i>		

Jeffrey P. Heineman	<input type="checkbox"/>	U.S. Mail, postage prepaid
Heineman Law Office	<input type="checkbox"/>	Hand-Delivered
1501 Tyrell Lane	<input type="checkbox"/>	Overnight Mail
Boise, Idaho 83706	<input checked="" type="checkbox"/>	Facsimile (208) 947-9009
Telephone: (208) 343-5687		
<i>Attorneys for Defendant Cook</i>		

Margalit Z. Ryan	<input type="checkbox"/>	U.S. Mail, postage prepaid
Bauer & French	<input type="checkbox"/>	Hand-Delivered
ParkCenter Pointe	<input type="checkbox"/>	Overnight Mail
1501 Tyrell Lane	<input checked="" type="checkbox"/>	Facsimile (208) 383-0412
Post Office Box 2730		
Boise, Idaho 83701-2730		
Telephone: (208) 383-0090		
<i>Attorneys for Defendant Cook</i>		



Tracy L. Wright

NO. _____
A.M. 10:33 P.M. _____

SEP - 3 2013

CHRISTOPHER D. RICH, Clerk
By CHAPY ABBOTT
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRACY SALES, individually,

Plaintiff,

vs.

STACIE PEABODY, individually and doing
business under the assumed name of
FINGERPRINTS DAY SPA; and LINDA
COOK, individually,

Defendants.

Case No. CVPI 12-06516

ORDER DENYING PLAINTIFF'S
MOTION TO RECONSIDER PRIOR
ORDER GRANTING SUMMARY
JUDGMENT ON COUNT I

This action is before the Court on Plaintiff's August 7, 2013 Motion to Reconsider the Court's July 25, 2013 Order Granting Summary Judgment on Count I.

On August 23, 2013, Defendants Stacie Peabody and Fingerprints Day Spa filed an opposition to Plaintiff's motion to reconsider. Defendant Linda Cook did not file anything because she had previously been dismissed from the case by order dated August 8, 2013. The parties have submitted the motion to reconsider on the pleadings, without oral argument. For the reasons set forth below, the Court denies Plaintiff's motion to reconsider the order granting summary judgment on Count I.

Plaintiff alleged in her Complaint, filed April 10, 2012, that her toe was punctured during a pedicure and that she was injured as a result. In relevant part, the Complaint stated: "...During the pedicure Plaintiff's right big toe was punctured or otherwise"

injured by an instrument or instruments being used to perform the pedicure...”
Complaint, para. 7, at 3.

Although it was not clear from the Complaint, it was made clear through Plaintiff’s subsequent pleadings and oral argument that Plaintiff contends her toe was punctured during a pedicure and placed in a dirty foot basin and, as a result of her foot’s exposure to the dirty foot basin, she contracted a mycobacterial infection which required multiple treatments and surgeries.

To understand the parties’ positions, it is important to know that the individual who performed the pedicure and allegedly punctured Plaintiff’s toe (“the puncturer”) is not the same individual who Plaintiff claims is responsible for the dirty foot basin. At this point in the lawsuit, the puncturer has been dismissed as a Defendant¹ and only the foot-basin-cleaner remains. Therefore, for Plaintiff to survive summary judgment, a genuine issue of material fact must exist with respect to each element of general negligence against Stacie Peabody, the foot-basin-cleaner.

These elements, previously set forth in the Court’s July 25, 2013 Order granting summary judgment on Count I, are: (1) a duty, recognized by law, requiring the defendant to conform to a certain standard of conduct; (2) a breach of duty; (3) a causal connection between the defendant’s conduct and the resulting injuries; and (4) actual loss or damage. *Alegria v. Payonk*, 101 Idaho 617, 619, 619 P.2d 135, 137 (1980).

The Court granted summary judgment on Count I, because (1) there was insufficient evidence in the record to create a genuine issue of material fact on the element of causation against Defendant Peabody and (2) as a matter of law, a third

¹ See August 8, 2013, Order of Dismissal on Defendant Linda Cook only, entered upon the stipulation of the parties.

party's action — the puncture — constituted a superseding cause that would bar Plaintiff's recovery against Defendant Peabody for failing to clean the foot basin.

On August 7, 2013, Plaintiff filed a motion to reconsider the Court's order granting summary judgment on Count I. In support of the motion to reconsider, Plaintiff filed an additional affidavit from Dr. Chandler on the element of causation. The entire affidavit is set forth here:

Jeffrey L. Chandler, D.P.M., being first duly sworn upon oath, deposes and says:

1. That this Affidavit of Jeffrey L. Chandler, D.P.M. is submitted in support of Plaintiff's Motion to Reconsider.
2. That Affiant is a practicing board certified podiatrist.
3. In my opinion letter dated May 8, 2013, I stated that I determined Tracy Sales had suffered a mycobacterial infection that was a result of the incident at the Salon. This opinion is my opinion and was, as I stated, a determinative opinion after affirmatively ruling out two other potential diagnoses. By use of the word "incident," I was referring to the presence of mycobacteria in the foot basin in which Tracy Sales received the pedicure at the Salon. Whether Tracy Sales received a prick, a poke, or a movement of her cuticle at or around the same time is not material to my medical opinion. Tracy Sales['] toe would have been infected with the mycobacterial [sic] at that time regardless of whether a prick, a poke, or a movement of the cuticle occurred.
4. Likewise, my use of the word "treatment" in response to question number two in my opinion letter dated May 8, 2013, refers to the placement of Tracy Sales' feet in the foot basin at the Salon, where her toe became infected with a mycobacteria.
5. All of the opinions expressed in my May 8, 2013, opinion letter were based on a reasonable degree of medical probability, which was in response to the request Mr. Jacobson made in his April 11, 2013, letter to me requesting my medical opinion. None of my opinions expressed in this matter are based on conjecture or hypothesis.

This affidavit was signed by Jeffrey L. Chandler on July 30, 2013.

Considering Dr. Chandler's most recent affidavit, Plaintiff has now submitted **some evidence** that Defendant Peabody's alleged failure to clean the foot basin caused Plaintiff's injury, and further, that this alleged failure to clean the foot basin was the sole cause of Plaintiff's injury, completely separate from any puncture. In other words, there is now — arguably at least — a genuine issue of material fact on each element of negligence against Defendant Peabody for failing to clean the foot basin.

The difficulty for the Court is that the tort Plaintiff has now supported with enough evidence to survive summary judgment is not the same tort pled in the Complaint. In her Complaint, Plaintiff alleged a puncture and injury. Plaintiff now alleges a dirty foot basin and injury. In the motion to reconsider, Plaintiff argues that "[n]owhere in Plaintiff's complaint is it alleged that the harm or injury was caused by or directly flowed from a 'puncture.' See Complaint, ¶ VII. It is only alleged that such puncture occurred." Plaintiff's Memorandum in Support of Motion to Reconsider, at 4-5. The plain language of the Complaint directly contradicts Plaintiff's position.

Paragraphs VII and VIII of the Complaint are reproduced here:

VII.

On or about April 19, 2010, Plaintiff was a customer at Defendant Peabody's facility, Finger Print Day Spa, and she had gone there for the purpose of obtaining a pedicure. Plaintiff's pedicure included various procedures on her feet and soaking her feet in basins used, maintained, and serviced at Defendant Peabody's facility. During the pedicure Plaintiff's right big toe was punctured or otherwise injured by an instrument or instruments being used to perform the pedicure. Defendant Linda Cook performed the pedicure on the date of the incident at Defendant Peabody's facility.

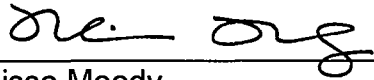
VIII.

Later, the cuticle and skin around the toe nail became red and swollen. Infection set in and Plaintiff's condition worsened, resulting in significant injury to Plaintiff, and Plaintiff required numerous treatments and procedures, including surgery.

Repeated readings of the entire Complaint do not reveal the particular tort (dirty foot basin, mycobacterial infection, and injury) that Plaintiff now asserts. Because a cause of action not raised in a party's pleadings cannot be considered on summary judgment, *Edmondson v. Shearer Lumber Products*, 139 Idaho 172, 178, 75 P.3d 733, 739 (2003), it would be improper for this Court to deny summary judgment to Defendants based on a theory of negligence raised for the first time in an affidavit in support of a motion to reconsider. Accordingly, Plaintiff's motion to reconsider granting summary judgment is denied.

IT IS SO ORDERED.

DATED this 3rd day of September 2013.



Melissa Moody
District Judge

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 3rd day of September 2013, I mailed

(served) a true and correct copy of the within instrument to:

James F. Jacobson, Esq.
JACOBSON & JACOBSON, PLLC
660 East Franklin Road, Suite 110
Meridian, ID 83642

☒ U.S. Mail, Postage Prepaid
() Hand Delivered
() Electronic Mail
() Facsimile

Jeffrey P. Heineman, Esq.
Attorney at Law
1501 Tyrell Lane
Boise, ID 83706

☒ U.S. Mail, Postage Prepaid
() Hand Delivered
() Electronic Mail
() Facsimile

Margalit Z. Ryan, Esq.
BAUER & FRENCH
Post Office Box 2730
Boise, ID 83701-2730

☒ U.S. Mail, Postage Prepaid
() Hand Delivered
() Electronic Mail
() Facsimile

David W. Knotts, Esq.
Tracy L. Wright, Esq.
CAREY PERKINS, LLP
Post Office Box 519
Boise, ID 83701-0519

☒ U.S. Mail, Postage Prepaid
() Hand Delivered
() Electronic Mail
() Facsimile

CHRISTOPHER D. RICH
Clerk of the District Court

By: 

Deputy Court Clerk

SEP 19 2013

CHRISTOPHER D. RICH, Clerk
By CHANTY ABBOTT
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRACY SALES, individually,

Plaintiff,

vs.

STACIE PEABODY, individually and doing
business under the assumed name of
FINGERPRINTS DAY SPA; and LINDA
COOK, individually,

Defendants.

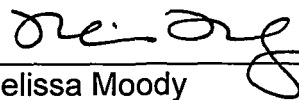
Case No. CVPI 12-06516

JUDGMENT

Plaintiff's August 7, 2013 Motion to Reconsider the Court's July 25, 2013 Order
Granting Defendants' Summary Judgment on Count I is denied.

IT IS SO ORDERED.

DATED this 18th day of September 2013.



Melissa Moody
District Judge



CERTIFICATE OF MAILING

I hereby certify that on this 19th day of September 2013, I mailed (served) a

true and correct copy of the within instrument to:

James F. Jacobson, Esq.
JACOBSON & JACOBSON, PLLC
660 East Franklin Road, Suite 110
Meridian, ID 83642

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Electronic Mail
☐ Facsimile

Jeffrey P. Heineman, Esq.
Attorney at Law
1501 Tyrell Lane
Boise, ID 83706

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Margalit Z. Ryan, Esq.
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David W. Knotts, Esq.
Tracy L. Wright, Esq.
CAREY PERKINS, LLP
Post Office Box 519
Boise, ID 83701-0519

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Electronic Mail
☐ Facsimile

CHRISTOPHER D. RICH
Clerk of the District Court

By: 
Deputy Court Clerk

JAMES F. JACOBSON, ISB #7011
ROBERT W. JACOBSON, ISB # 7156
JACOBSON & JACOBSON, PLLC
660 E. Franklin Road, Suite 110
Meridian, ID 83642
Telephone: (208) 884-1995
Facsimile: (208) 477-5210
Email: james@jjlawidaho.com
Email: bob@jjlawidaho.com

NO. _____
A.M. _____ P.M. 411

SEP 24 2013

CHRISTOPHER D. RICH, Clerk
By **JAMIE MARTIN**
DEPUTY

Attorneys for Appellant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL

DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRACY SALES, individually;

Appellant,

vs.

STACIE PEABODY, individually and doing
business under the assumed name of
FINGERPRINTS DAY SPA;

Respondent.

Case No. CV PI 1206516

NOTICE OF APPEAL

**TO: CLERK OF ABOVE-ENTITLED COURT; AND
STACIE PEABODY d/b/a FINGERPRINTS DAY SPA, RESPONDENT, AND
ATTORNEY OF RECORD, TRACY L. WRIGHT OF CAREY PERKINS, LLP**

NOTICE IS HEREBY GIVEN that the above-named Appellant, Tracy Sales, appeals
against the above-named Respondent, Stacie Peabody d/b/a Fingerprints Day Spa (hereinafter
“Defendant”), to the Idaho Supreme Court from the Order Granting Defendants’ Motion for

NOTICE OF APPEAL - 1

000371

Summary Judgment on Count I that was issued on July 24, 2013, and the Order Denying Plaintiff's Motion to Reconsider Prior Order Granting Summary Judgment on Count I that was issued on September 3, 2013, together with all other interlocutory judgments and orders entered prior thereto in this action, Honorable Melissa Moody presiding. That Appellant has the right to appeal to the Idaho Supreme Court, with the final appealable order being entered by the district court in this action on September 19, 2013, thereby making the above referenced Order and Judgment appealable pursuant to I.A.R. 11(a)(1).

Preliminarily, the issues to be determined on appeal are as follows:

1. whether Plaintiff has alleged a negligence cause of action against Defendant; and
2. whether a genuine issue of material fact exists as to causation in Plaintiff's Count I negligence claim.

This list of issues to be determined on appeal shall not prevent Appellant from asserting other issues on appeal. No reporter's transcript is requested at this time.

In addition to the standard record provided for in I.A.R. 28, Appellant hereby requests that the following documents be included in the clerk's record on appeal:


- Affidavit of Linda Cook filed April 25, 2013
- Affidavit of James F. Jacobson in Opposition to Defendant's Motion for Summary Judgment.
- Defendants Stacie Peabody and Fingerprints Day Spa's Motion to Strike the Disclosure of Doug Schoon and for Summary Judgment RE: Count I – Negligence.

- Memorandum in Support of Defendants Stacie Peabody and Fingerprints Day Spa's Motion to Strike the Disclosure of Doug Schoon, and for Summary Judgment RE: Count I – Negligence.
- Defendants' Reply Memorandum Re: Motion to Strike and Motion for Summary Judgment, and Response to Plaintiff's Motion to Strike.
- Affidavit of Tracy L. Wright.
- Plaintiff's Memorandum in Opposition to Defendant's Second Motion for Summary Judgment and Motion to Strike.
- Affidavit of Linda Cook filed July 2, 2013.
- Plaintiff's Motion to Strike.
- Affidavit of Doug Schoon.
- Affidavit of Jeffrey L. Chandler, DPM.
- Affidavit of James F. Jacobson in Opposition to Defendant's Second Motion for Summary Judgment and Motion to Strike.
- Plaintiff's Supplemental Memorandum in Opposition to Defendant's Second Motion for Summary Judgment.
- Plaintiff's Motion to Reconsider.
- Plaintiff's Memorandum in Support of Motion to Reconsider.
- Affidavit of James F. Jacobson in Support of Plaintiff's Motion to Reconsider.
- Affidavit of Jeffrey L. Chandler, DPM, In Support of Plaintiff's Motion To Reconsider.

- Defendants Stacie Peabody and Fingerprints Day Spa's Memorandum in Opposition to Plaintiff's Motion for Reconsideration.

DATED this 24th day of September, 2013.

JACOBSON & JACOBSON, PLLC

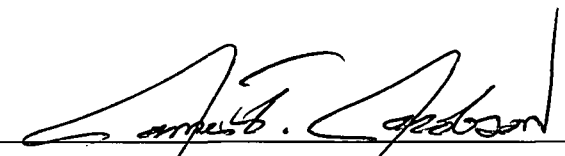
By 
James F. Jacobson, Of the Firm
Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of September, 2013, a true and correct copy of the foregoing was served upon the follow attorneys of record via method below:

David W. Knotts; Tracy L. Wright
Carey Perkins, LLP
Capitol Park Plaza
300 N. 6th Street, Ste. 200
P. O. Box 519
Boise, ID 83701
*Attorneys for Defendant, Stacie Peabody
and Fingerprints Day Spa*

☒ U.S. Mail, postage prepaid
☐ Hand-Delivered
☐ Overnight Mail
☐ Facsimile (208) 529-0005
☐ Email:
dwknotts@careyperkins.com
tlwright@careyperkins.com


James F. Jacobson

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRACY SALES, individually,

Plaintiff-Appellant,

vs.

STACIE PEABODY, individually and doing
business under the assumed name of
FINGERPRINTS DAY SPA,

Defendant-Respondent,

and

LINDA COOK, individually,

Defendant.

Supreme Court Case No. 41446

CERTIFICATE OF EXHIBITS

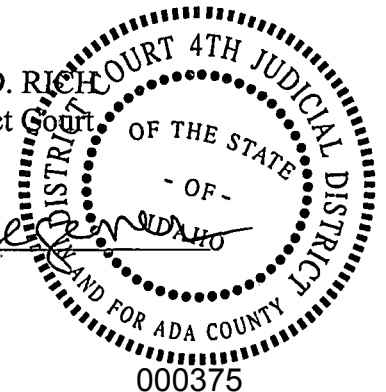
I, CHRISTOPHER D. RICH, Clerk of the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada, do hereby certify:

There were no exhibits offered for identification or admitted into evidence during the course of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 1st day of October, 2013.

CHRISTOPHER D. RICH
Clerk of the District Court

By 
Deputy Clerk



CERTIFICATE OF EXHIBITS

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRACY SALES, individually,

Plaintiff-Appellant,

vs.

STACIE PEABODY, individually and doing
business under the assumed name of
FINGERPRINTS DAY SPA,

Defendant-Respondent,

and

LINDA COOK, individually,

Defendant.

Supreme Court Case No. 41446

CERTIFICATE OF SERVICE

I, CHRISTOPHER D. RICH, the undersigned authority, do hereby certify that I have
personally served or mailed, by either United States Mail or Interdepartmental Mail, one copy of
the following:

CLERK'S RECORD

to each of the Attorneys of Record in this cause as follows:

JAMES F. JACOBSON

ATTORNEY FOR APPELLANT

MERIDIAN, IDAHO

TRACY L. WRIGHT

ATTORNEY FOR RESPONDENT

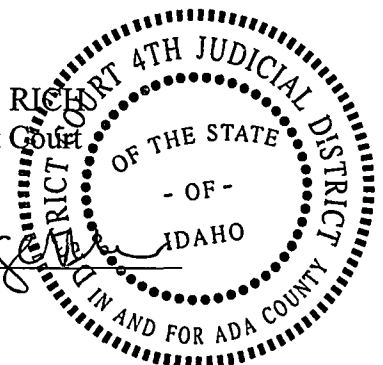
BOISE, IDAHO

Date of Service: OCT 01 2013

CERTIFICATE OF SERVICE

CHRISTOPHER D. RICH
Clerk of the District Court

By [Signature]
Deputy Clerk



000376

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRACY SALES, individually,

Plaintiff-Appellant,

vs.

STACIE PEABODY, individually and doing
business under the assumed name of
FINGERPRINTS DAY SPA,

Defendant-Respondent,

and

LINDA COOK, individually,

Defendant.

Supreme Court Case No. 41446

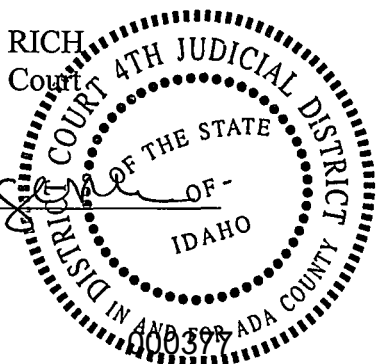
CERTIFICATE TO RECORD

I, CHRISTOPHER D. RICH, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the above and foregoing record in the above-entitled cause was compiled under my direction as, and is a true and correct record of the pleadings and documents that are automatically required under Rule 28 of the Idaho Appellate Rules, as well as those requested by Counsel.

I FURTHER CERTIFY, that the Notice of Appeal was filed in the District Court on the 24th day of September, 2013.

CHRISTOPHER D. RICH
Clerk of the District Court

By *K. Segura*
Deputy Clerk



CERTIFICATE TO RECORD

OCT 07 2013

CHRISTOPHER D. RICH, Clerk
By KATHY BIEHL
Deputy

David W. Knotts, ISB No. 3627
Tracy L. Wright, ISB No. 8060
CAREY PERKINS LLP
Capitol Park Plaza
300 North 6th Street, Suite 200
P. O. Box 519
Boise, Idaho 83701
Telephone: (208) 345-8600
Facsimile: (208) 345-8660

Attorneys for Defendant-Respondents
Stacie Peabody and Fingerprints
Day Spa

ORIGINAL

IN THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

TRACY SALES, individually,

Plaintiff-Appellant,

vs.

STACIE PEABODY, individually and
doing business under the assumed name
of FINGERPRINTS DAY SPA; and
LINDA COOK, individually,

Defendant-Respondents,

and

LINDA COOK, individually,

Defendant.

Supreme Court Case No. 41446

District Court Case No. CV PI 2012-
06516

REQUEST FOR ADDITIONAL
TRANSCRIPT/RECORDS

TO: THE ABOVE NAMED APPELLANT AND THE PARTY'S ATTORNEY, AND
THE REPORTER (Tiffany Fisher) AND CLERK OF THE ABOVE ENTITLED COURT.

BT

NOTICE IS HEREBY GIVEN, that the Respondent in the above entitled proceeding hereby requests pursuant to Rule 19, I.A.R., the inclusion of the following material in the clerk's record in addition to that required to be included by the I.A.R. and the notice of appeal. Any additional transcript is to be provided in both hard copy and electric format:

1. 04/25/2013 Motion for Summary Judgment;
2. 04/25/2013 Memorandum in Support of Motion for Summary Judgment;
3. 04/25/2013 Affidavit of Stacie Peabody;
4. 05/21/2013 Defendants Stacie Peabody and Fingerprints Day Spa's Reply Memorandum in Support of Motion for Summary Judgment;
5. 05/23/2013 Affidavit of Jeffrey L. Chandler DPM;
6. 05/28/2013 Hearing result for Motion for Summary Judgment scheduled on 5/28/2013 4:00 PM; District Court (transcript);
7. 05/30/2013 Order Granting Defendants' Motion for Summary Judgment on Count II of the Complaint;
8. 06/04/2013 Affidavit of Doug Schoon;
9. 07/15/2013 Hearing result for Motion Scheduled on 07/15/2013 10:00 AM; District Court (transcript);
10. 07/19/2013 Memorandum of Authority in Support of Defendants Motion for Summary Judgment;
11. 08/06/2013 Stipulation to Dismiss Linda Cook; and
12. 08/07/2013 Rule 54(b) Certificate.

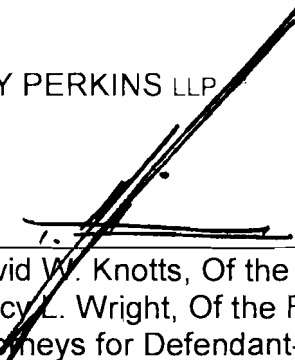
I certify that a copy of this request for additional transcript has been served to each Court reporter of whom a transcript is requested as named below at the addresses set out below and the estimated number of additional pages being requested is 100.

I further certify that this request for additional record has been served upon the clerk of the district court and upon all parties required to be served pursuant to Rule 20.

DATED this 17th day of October, 2013.

CAREY PERKINS LLP

By


David W. Knotts, Of the Firm
Tracy L. Wright, Of the Firm
Attorneys for Defendant-
Respondents Stacie Peabody and
Finger Prints Day Spa

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of October, 2013, I served a true and correct copy of the foregoing REQUEST FOR ADDITIONAL TRANSCRIPT/RECORDS by delivering the same to each of the following, by the method indicated below, addressed as follows:

James F. Jacobson	<input checked="" type="checkbox"/>	U.S. Mail, postage prepaid
Robert W. Jacobson	<input type="checkbox"/>	Hand-Delivered
JACOBSON & JACOBSON, PLLC	<input type="checkbox"/>	Overnight Mail
660 E. Franklin Rd., Ste. 110	<input type="checkbox"/>	Facsimile (208) 477-5210
Meridian, Idaho 83642		
Telephone: (208) 884-1995		
<i>Attorneys for Plaintiff-Appellant</i>		

Jeffrey P. Heineman	<input checked="" type="checkbox"/>	U.S. Mail, postage prepaid
Heineman Law Office	<input type="checkbox"/>	Hand-Delivered
1501 Tyrell Lane	<input type="checkbox"/>	Overnight Mail
Boise, Idaho 83706	<input type="checkbox"/>	Facsimile (208) 947-9009
Telephone: (208) 343-5687		
<i>Attorneys for Defendant Cook</i>		

Margalit Z. Ryan	<input checked="" type="checkbox"/>	U.S. Mail, postage prepaid
Bauer & French	<input type="checkbox"/>	Hand-Delivered
ParkCenter Pointe	<input type="checkbox"/>	Overnight Mail
1501 Tyrell Lane	<input type="checkbox"/>	Facsimile (208) 383-0412
Post Office Box 2730		
Boise, Idaho 83701-2730		
Telephone: (208) 383-0090		
<i>Attorneys for Defendant Cook</i>		

Tiffany Fisher	<input type="checkbox"/>	U.S. Mail, postage prepaid
Ada County Courthouse	<input checked="" type="checkbox"/>	Hand-Delivered
200 W. Front Street	<input type="checkbox"/>	Overnight Mail
Boise, Idaho 83702	<input type="checkbox"/>	Facsimile (208) 287-6919
Telephone: (208) 287-7528		
<i>Court Reporter</i>		

Clerk of the District Court	<input checked="" type="checkbox"/>	U.S. Mail, postage prepaid
Ada County Courthouse	<input type="checkbox"/>	Hand-Delivered
200 W. Front Street	<input type="checkbox"/>	Overnight Mail
Boise, Idaho 83702	<input type="checkbox"/>	Facsimile (208) 287-6919
Telephone: (208) 287-7500		



Tracy L. Wright

NOV - 5 2013
CHIEF CLERK, Clerk
by DEBRA A. BOUTT
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRACY SALES, individually,

Plaintiff,

vs.

STACIE PEABODY, individually and doing
business under the assumed name of
FINGERPRINTS DAY SPA; and LINDA
COOK, individually,

Defendants.

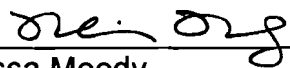
Case No. CVPI 12-06516

AMENDED JUDGMENT

Judgment is hereby entered in favor of Defendants Stacie Peabody and
Fingerprints Day Spa, dismissing all of Plaintiff's claims.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED and this does order,
adjudge and decree that Plaintiff takes nothing on her Complaint, and that costs be
awarded to Defendant Peabody and Fingerprints Day Spa in the amount of \$173.48.

DATED this 4th day of November 2013.



Melissa Moody
District Judge

CERTIFICATE OF MAILING

I hereby certify that on this 5 day of November 2013, I mailed (served) a true and correct copy of the within instrument to:

James F. Jacobson
JACOBSON & JACOBSON, PLLC
660 E Franklin Rd, Ste 110
Meridian, ID 83642

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Electronic Mail
☐ Facsimile

Jeffrey P. Heineman
Attorney at Law
1501 Tyrell Lane
Boise, ID 83706

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
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☐ Facsimile

Margalit Z. Ryan
BAUER & FRENCH
PO Box 2730
Boise, ID 83701-2730

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☐ Facsimile

David W. Knotts
Tracy L. Wright
CAREY PERKINS, LLP
PO Box 519
Boise, ID 83701-0519

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Electronic Mail
☐ Facsimile

CHRISTOPHER D. RICH
Clerk of the District Court

By: 
Deputy Court Clerk

NO. _____
A.M. 8:00 FILED P.M. _____

TO: Clerk of the Court
Idaho Supreme Court
451 West State Street
Boise, Idaho 83720
(208) 334-2616

NOV 15 2013

CHRISTOPHER D. RICH, Clerk
By BRADLEY J. THIES
DEPUTY

IN THE SUPREME COURT OF THE STATE OF IDAHO

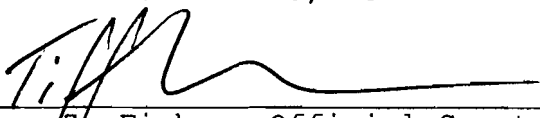
----- x Docket No. 41431
:
TRACY SALES, individually, :
:
Plaintiff-Appellant, :
:
vs. :
:
STACIE PEABODY, individually and :
doing business under the assumed name :
of FINGERPRINTS DAY SPA; and LINDA :
COOK, individually, :
:
Defendant-Respondents. :
:
and :
:
LINDA COOK, individually :
:
Defendant. :
----- x

NOTICE OF TRANSCRIPT OF 72 PAGES LODGED

**Appealed from the District Court of the Fourth Judicial
District of the State of Idaho, in and for the County of Ada,
Honorable Melissa Moody, District Court Judge.**

**This transcript contains: 05-28-13 Motion to Suppress
07-15-13 Motion to Suppress/
Motion to Strike**

DATE: November 15, 2013



Tiffany Z. Fisher, Official Court Reporter
Official Court Reporter,
Judge Melissa Moody
Ada County Courthouse
Idaho Certified Shorthand Reporter No. 979
Registered Professional Reporter